95-767

Supreme Court, U.S.
FILED
NOV 13 1995
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No.

In The Supreme Court of the United States

OCTOBER TERM, 1995

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,
Petitioner,

v.

J. JACK BRAS, INDIVIDUALLY AND DBA BUSINESS AS J. JACK BRAS & ASSOCIATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 13, 1995

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QUESTIONS PRESENTED

1. Whether respondent has standing to challenge a California statute and implementing regulations of the Public Utilities Commission of the State of California ("Commission") that establishes voluntary goals, not quotas, set-asides or preferences, for the procurement of goods and services by public utilities from women and minority business enterprises in public utility procurement programs:

   a.) Whether respondent has satisfied the injury-in-fact requirement where respondent failed to demonstrate that the statute and implementing regulations impose a barrier to his placing a bid for an architectural public utility contract; and

   b.) Whether respondent has demonstrated a causal nexus between his alleged injury that is fairly traceable to the Commission where the alleged injury results from the independent acts of a third party public utility not before the court.

LIST OF PARTIES

The petitioner is the Public Utilities Commission of the State of California ("Commission"), Philip Bremond in his representative capacity as Women, Minority, Disabled Veteran Business Enterprise Program Manager* and Neal Shulman, in his representative capacity as former Executive Director. The respondent is J. Jack Bras, individually and doing business as J. Jack Bras & Associates.

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* Hereinafter, the use of the word "Petitioner" includes the Commission, Philip Bremond and Neal Shulman.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, the Public Utilities Commission of the State of California ("CPUC" or "Commission"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 23, 1995.

OPINIONS BELOW

The March 17, 1993 order of the District Court granting Petitioner's motion for summary judgment is unreported. *Bras v. California Public Utilities Commission,* No. CV-92-0304-WHO (N.D. Cal. March 17, 1993). App. 25-42.[1] The July 5, 1995 opinion of the Ninth Circuit Court of Appeals is reported as *Bras v. California Public Utilities Commission*, 59 F.3d 869 (9th Cir. 1995). App. 1-24.

[1] Where indicated, "App." refers to the Appendix of this petition.

JURISDICTION

On July 5, 1995, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") rendered the judgment which petitioner seeks to have reviewed. On August 15, 1995, the Ninth Circuit denied the Commission's petition for rehearing and suggestion of appropriateness of rehearing *en banc.* App. 43. The judgment of the Ninth Circuit was entered on August 23, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

California Public Utilities Code sections § 8281-8386 and the Commission's General Order 156 are fully set forth in the Appendix. App. 62-91.

STATEMENT OF THE CASE

1. Statement of Facts

In 1986, the California State Legislature passed the "Women and Minority Business Enterprises" ("WMBE") Law, effective January 1, 1987, which is codified at sections 8281-8286 of the California Public Utilities Code ("Code").[2] In 1990, the Legislature added disabled veteran business enterprises to the Code. The Commission's program is now referred to as the Women, Minority and

[2] Prior to any legislative action, the Commission has overseen programs to increase the participation of minority-owned and women-owned businesses in public utility contracting. Pursuant to a 1977 Commission investigation, the Commission first established reporting requirements in 1982, for WMBE procurement by the major utilities and also ordered that each utility's WMBE program be reviewed in general rate case proceedings. D.82-12-101, 10 Cal.P.U.C.2d 414 (1982). The Commission subsequently required utilities to submit tracking procedures for WMBE activities, including the reporting of procurement results by ethnicity, gender and procurement categories.

Disabled Veterans Business Enterprises ("WMDVBE") Program. The Code requires the Commission to establish guidelines for all gas, electric, and telephone utilities with gross annual revenues exceeding $25 million and their Commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to the Code, including a procedure for the utilities to submit annual detailed and verifiable plans for increasing utility procurement of goods and services from WMDVBEs in all categories. Code § 8283(a) & (c), App. 65. The Code requires that these annual plans shall include short- and long-term goals and timetables, but not quotas, and that these plans include methods for encouraging both prime contractors and grantees to engage WMDVBEs in subcontracts in all categories which provide subcontracting opportunities. Code § 8283(b), App. 65.

The Commission's General Order 156 ("Order"), which implements the Code, requires utilities to set substantial and verifiable short-term (one year), mid-term (three years) and long-term (five years) goals for the utilization of WMBEs. Order § 8, App. 85. Section 1.3.13 of the Order defines "goal" as a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." Order § 1.1.13, App. 75. The Order establishes goals of not less than 15 per cent for Minority Business Enterprises ("MBEs") and 5 per cent for Women Business Enterprises ("WBEs"). Order § 8.2, App. 85. The Commission's WMDVBE Program is not a set-aside program. Moreover, the Commission does not prescribe any particular method or means by which utilities must pursue these goals. Each utility is free to design its own WMDVBE program according to the particular requirements and needs of the individual utility and to use its judgment with respect to the most appropriate means to be employed. Furthermore, the utilities retain their authority to use their legitimate business judgment to select the best person for the

work at hand and members of all racial, ethnic, and national origin classifications are allowed to compete. In addition, where application of any of these rules results in undue hardship or unreasonable expense to a utility, section 1.1.3 of the Order allows a utility to request relief by filing an application or an advice letter with the Commission. Order § 1.1.3, App. 74.

From 1969 to 1991, respondent Bras, a white male architect, provided architectural services to Pacific Bell, a telephone public utility regulated by the Commission. Approximately 30 per cent of Bras' gross receipts after 1983 came from architectural services provided to Pacific Bell. In February, 1991, Bras received a letter from Pacific Bell requesting preliminary business information from firms that had recently provided architectural services to Pacific Bell's Real Estate Management organization in the San Francisco Bay Area. Pacific Bell indicated in that letter that in an effort to improve the overall quality of real estate services within Pacific Bell, it intended to develop improved business partnerships with the firms with which it continued to do business. Toward that end, Pacific Bell indicated that it believed that those improvements were more likely to be accomplished with a limited number of affiliations. E.R. 114, App. 92.[3] With its letter, Pacific Bell included a "Pre-Qualification Criteria" form which Pacific Bell used to assist it in selecting a group of architectural firms to submit proposals. Question 10 on the form asked: "[A]re you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status?" Bras completed the form and answered question 10 in the negative and returned the form to Pacific Bell on February 4, 1991. E.R. 115-117, App. 94-96.

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[3] Where indicated, "E.R." refers to the **Excerpts of Record** filed with the Ninth Circuit, below.

In response to Pacific Bell's solicitation, thirteen firms completed the forms. Pacific Bell performed a selected weighting of the thirteen firms on the basis of quality of past performance, central office design experience, administrative space design experience, WMBE status, number of licensed architects, number of years in business, 1990 expenditures, CAD capability, and size of organization. E.R. 124-125, App. 97-99. Under Pacific Bell's weighting criteria of a total of 95 points, points were given in each of these categories with the majority of the weighting criteria based on past performance (25 points), administrative design experience (10 points), and central office design experience (25 points). E.R. 130, App. 46. A WMBE received 10 points. *Id.* A non-WMBE received zero points in that category.

In June 1991, Bras was informed by Pacific Bell that it had made a business decision to work closely with a small number of suppliers in the San Francisco Bay Area and to develop working relationships with those firms over a period of time. Mr. Jack Behuresht, Pacific Bell's Director of Project Management Real Estate, informed Bras that:

> [s]ince a close relationship is very difficult to maintain when working with a large number of architectural firms, we unfortunately, have had to sacrifice some past associations with very competent and professional firms such as yours. The process that we used to select architectural firms in the Bay Area included evaluation of current information that you submitted in your letter of February 4th. We also surveyed the past experiences of our project managers and field engineers with each firm. I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance . . . We plan to maintain your information on file and will be happy to consider Bras & Associates when our

> contract for architectural services is reevaluated in the future.

E.R. 119, App. 100.

Through subsequent communication and meetings with Pacific Bell, Bras was informed that he ranked sixth among the thirteen firms. The firm that finished third in the ranking was an MBE. In his deposition, Mr. Behuresht stated that the top three in the ranking did not automatically get a contract with Pacific Bell. While acknowledging that "mathematically" Bras would have ranked third if the WMBE factor had been eliminated, Mr. Behuresht emphasized that the selection was not done strictly on a mathematical basis. E.R. 70-72, App. 103-105. Pacific Bell's decision was to engage the top three firms for further review and negotiation, because potentially, Pacific Bell may not have reached an agreement with any of these firms to go further. It was a preliminary screening, just a guide for Pacific Bell to go through successive steps. E.R. 72, App. 104-105. Indeed, Mr. Behuresht stated that it was not true that Bras would have been one of the top three firms had the WMBE status been eliminated as a factor. He stated:

> [t]he way we look at it is we put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these types of services. On this particular scenario that you described, had Mr. Bras been the third firm, we would have been in a very awkward position of not having an architectural — not having more than one architectural firm that was proficient on the administrative design experience.

E.R. 72-73, App. 105. Mr. Behuresht again stressed that Pacific Bell did not pick the top three exclusively based on mathematics. Pacific Bell looked at the top three to ensure

that the top three would provide the balanced capabilities Pacific Bell needed. That allowed Pacific Bell to go to the next step of beginning the dialogue on association with those firms, of negotiating and of receiving additional data. E.R. 75-76, App. 108-109. In addition, contract changes were involved. If one of the firms did not prevail, then Pacific Bell would have gone back to the list and taken the next firm in a balanced way that would complement the firms that they had, not necessarily the firm with the next highest mathematically weighted score. E.R. 77, App. 109-110. None of the decisions made by Pacific Bell concerning its procurement of architectural services or the method of evaluating qualifications were required by the Code or Order, nor reviewed or approved by the Commission.

2. Proceedings Below

On January 10, 1992, Bras filed a complaint against Pacific Bell alleging Pacific Bell's WMBE program violated Bras' statutory and constitutional rights in view of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Bras also named the Commission and two individuals as defendants,[4] alleging the Code and the Commission's Order also violated his constitutional rights. Bras sought damages from Pacific Bell. In the course of the proceedings before the District Court, Bras executed a settlement under seal with Pacific Bell, pursuant to which Pacific Bell was dismissed with prejudice from the proceeding. Bras represented to the District Court that 50 percent of the monetary consideration he received under the settlement compensated him for economic damages (*i.e.*, his lost business with Pacific Bell), while the remaining 50 percent compensated him for non-economic damages. *Bras v. California Public Utilities Com-*

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[4] The individuals, both of whom are named in their representative capacities, are Philip Bremond, WMDVBE Program Manager for the Commission, and Neal Shulman, former Executive Director of the Commission. Mr. Shulman is no longer employed by the Commission.

mission, No. CV-92-0304-WHO, slip op. at 9 (N.D. Cal. March 17, 1993), App. 33. However, Bras continued his action against the Commission seeking declaratory and injunctive relief. Upon cross motions for summary judgment, the District Court granted the motion of the Commission and denied Bras' motion on the ground that Bras had failed to satisfy the injury component for Article III standing.

In its decision, the District Court noted Bras alleged he lost business as a result of the Code and the Order, *i.e.*, his account with Pacific Bell, which formed the basis of his claim for damages against Pacific Bell. However, the District Court pointed out that Bras did not allege he might lose any "future" business because of either the Code or the Order. The District Court further stated Bras "did not allege, and there is nothing in the record to indicate that plaintiff ever has done (or ever intends to bid for) any work for a utility, other than Pacific Bell, that is subject to" the Code and Order, and that Bras' settlement with Pacific Bell extinguished all of his claims with respect to Pacific Bell." *Id.* at 16-17, App. 39. The District Court concluded that:

> For its part, Pacific Bell already has entered into "improved business relationships" with architectural firms in the Bay Area and plaintiff is not one of those firms. Plaintiff has neither alleged nor presented the Court with a shred of evidence that Pacific Bell would not have attempted to narrow the number of architectural firms it used in the absence of the WMBE and the General Order; nor has plaintiff presented any evidence that Pacific Bell would reevaluate its decision not to retain plaintiff for further business were the WMBE nullified. Plaintiff's only legal complaint with the process Pacific Bell used to determine which firms it would continue to employ was that it should not have considered WMBE status as part of the

> equation. Plaintiff's settlement with Pacific Bell effectively extinguished that objection, and with it plaintiff's charge that the WMBE and the General Order interfered with his business opportunities in a constitutionally intolerable manner.

Id. at 17-18, App. 40-41. The District Court also rejected Bras' claim that he had standing to seek declaratory and injunctive relief on behalf of himself and all other "similarly situated" white males. *Id.* at 18, App. 41. Having found that Bras lacked standing, the District Court did not address the merits of Bras' constitutional claims. Bras appealed.

On July 5, 1995, in a split decision, the Ninth Circuit reversed and remanded, concluding that Bras had satisfied his burden of showing injury-in-fact and that Bras has standing to seek declaratory and injunctive relief against the Commission. *Bras v. California Public Utilities Commission.* 59 F.3d 869 (9th Cir. 1995). The Ninth Circuit found a sufficient causal nexus between Bras' injury and the Commission's actions in enforcing the Code and implementing the Order because "the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs." *Id.* at 875, App. 16. In addition, the Ninth Circuit found Bras met the "future injury" prong of the injury-in-fact requirement for injunctive relief, determining that Bras will suffer future injury if the Commission's program is not enjoined. *Id.* at 874, App.13. Judge Pregerson delivered a vigorous dissent and challenged the majority's conclusions. Judge Pregerson concluded that Bras had failed to establish a causal nexus between the state's provisions and any future injury that Bras may incur from a utility's specific program. *Id.* at 879, App. 23. He further concluded that "Bras offers us a hypothetical injury, abstract in nature. We should not exceed our judicial authority by holding that he has standing." *Id.* App. 24.

On July 19, 1995, petitioner filed a petition for rehearing and suggestion of appropriateness of rehearing *en banc*. On August 15, 1995, the Ninth Circuit denied that petition. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I.

THE NINTH CIRCUIT HAS DECIDED A QUESTION OF FEDERAL LAW IN A WAY THAT DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND ARTICULATES AN UNUSUALLY BROAD AND NOVEL VIEW OF STANDING.

The Court should grant this petition because this proceeding involves a question of exceptional importance, *i.e.*, Article III standing. The Ninth Circuit's opinion is in direct conflict with the "injury-in-fact," causation and redressibility requirements set forth in the Supreme Court decisions in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992); *ASARCO Inc. v. Kadish,* 490 U.S. 605 (1989); *Allen v. Wright,* 468 U.S. 737 (1984); *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26 (1976); and *Warth v. Seldin,* 422 U.S. 490 (1975). The Ninth Circuit's opinion articulates an unusually broad and novel view of standing to litigate a substantive question in the federal courts. "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas,* 495 U.S. 149, 155-56 (1990). The Ninth Circuit has done so here. As such, the Ninth Circuit is plainly wrong and strikes a serious blow to judicial efficiency and to the limits on judicial review. Such a broad interpretation of standing will result in a needless waste of judicial resources and unnecessary litigation. Moreover, the Ninth Circuit's interpretation completely undermines the "case-or-controversy" requirement of Article III of the U.S. Constitution.

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan,* 504 U.S. at 560.

> The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments, this Court said 90 years ago, "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy."

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1981) (quoting *Chicago & Grand Trunk Ry. v. Wellman,* 143 U.S. 339, 345 (1892)). In the instant case, respondent Bras can manufacture no real, earnest and vital controversy against the Commission.

II.

THE NINTH CIRCUIT'S RELAXATION OF THE INJURY-IN-FACT PRONG OF ARTICLE III STANDING UNDERMINES CONSTITUTIONAL STANDING REQUIREMENTS AND IMPERMISSIBLY EXPANDS FEDERAL COURT JURISDICTION.

The Ninth Circuit's opinion is in direct conflict with Supreme Court precedent on standing. The "irreducible constitutional minimum of standing" requires the demonstration of three elements:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'." Second, there must be a causal con-

> nection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (alterations in original) (citations omitted). This Court has firmly established precedent that requirements for standing must be strictly enforced. *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965). The Ninth Circuit has diverged from this principle in finding that Bras satisfies the injury-in-fact requirement. In so doing, the Ninth Circuit has enlarged limited federal court jurisdiction beyond the bounds contemplated by the framers of the U.S. Constitution.

It takes more than the mere allegation of a legal right to establish standing. In *Valley Forge Christian College,* 454 U.S. at 483, the Court declared that the "assertion of a right . . . cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." If the injury requirement is to have any meaning, Bras must unequivocally establish he has satisfied this essential requisite for going forward with his case. Bras has failed to do so. The Ninth Circuit's placing of its imprimatur upon this serious deficiency is an improper attempt to reach the merits of Bras' lawsuit in a rush to address a controversial topic. "The fundamental aspect of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen,* 392 U.S. 83, 99 (1968).

A. Bras Failed to Show Actual or Imminent Injury.

To establish Article III standing, plaintiff must show an actual or imminent injury, fairly traceable to the challenged

agency action, and likely to be redressed by the relief sought. *Lujan,* 504 U.S. at 560-61. Of the three requirements, "the most important is the injury requirement." *Cone Corp. v. Florida Dep't. of Transp.,* 921 F.2d 1190, 1204 (11th Cir. 1991). Bras plainly has the burden of proof:

> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Lujan, 504 U.S. at 561 (citations omitted). The failure to satisfy the injury requirement goes to the heart of whether Bras has the right to go forward with his suit. Bras has utterly failed to meet this burden.

To satisfy the injury prong of Article III standing, the injury must be actual or imminent. *Whitmore,* 495 U.S. at 155. Bras' showing is insufficient to show either. First, Bras failed to show that he suffered actual injury. Bras admits that the settlement compensated him for past injury. E.R. 57, App. 33. Therefore, the settlement with Pacific Bell extinguished any claims for damages due to past injury. During the past three years since the award of the contracts, Bras suffered no actual injury. Bras was on the same footing with everyone else. There were no contracts being offered during that three year period, therefore, he cannot claim actual injury on that basis.[5]

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[5] *Cf., Nelson v. King County,* 895 F.2d 1248, 1251 (9th Circ. 1990). (Determination of standing cannot be based upon a naked statistical assertion); *cf., Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097 (June 12, 1995), where recently the U.S. Supreme Court found standing where the Central Federal Lands Highway Division was likely to

The Ninth Circuit acknowledges that "[b]ecause Bras seeks declaratory and injunctive relief only, it is insufficient for him to demonstrate that he was injured in the past." *Bras,* 59 F.3d at 873, App. 9-10. This Court echoes that principle: "But as we explained in *Los Angeles v. Lyons,* 461 U.S. 95 (1983), the fact of past injury, while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again suffer similar injury in the future." *Adarand Constructors, Inc. v. Pena,* 115 S.Ct. 2097, ____ (June 12, 1995) (citations omitted).

Where only injunctive or declaratory relief is sought, as in the instant case, a plaintiff must show a " 'very significant possibility' of future harm." *Coral Constr. Co. v. King County,* 941 F.2d 910, 929 (9th Cir. 1991) *cert. denied,* 502 U.S. 1033 (1992) (*"Coral Construction"*) (citation omitted). The alleged injury must be imminent or not so attenuated that it is unlikely to happen again.[6] The issue is whether Bras has made an adequate showing that in the near future he will bid on an architectural contract being offered by a California public utility, and the Code or Order will subject him to an immediate threat of injury to his equal protection right to bid on an equal footing with any other qualified architect. The plain answer is that Bras did not make such a showing. Nor could he, because there is nothing in the Code and Order that precludes Bras from competing on an equal footing.

This Court asserts that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes — that the injury is *'certainly* impending'. " *Lujan,* 504 U.S. at 565 n.2

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award contracts at least once a year and that Adarand was very likely to bid on such contract.

[6] *See Lyons,* 461 U.S. at 95; *see also, Whitmore,* 495 U.S. at 149.

(emphasis in original) (citing *Whitmore,* 495 U.S. at 158). Proof of a present intent to bid in the near future is essential to proving future injury. The Ninth Circuit acknowledges that Bras' complaint and summary judgment declaration do not assert that he presently intends to bid. *Bras,* 59 F.3d at 873, App. 11. Bras did not state with any certainty that he has definite plans of competing for assignments with Pacific Bell in the near future. Nor did he express any interest in seeking architectural work with any other California public utility.

Bras merely expressed a general desire "to reinstate [his] long term business relationship with Pacific Bell in the performance of architectural services to it **in the future,**" claiming to be "ready, willing and able to provide such services should [he] be given an opportunity to do so." E.R. 57 (emphasis added), App. 114. Bras' stated desire to do business with Pacific Bell "in the future" does not satisfy the imminence requirement for Article III standing. Neither Bras' complaint nor declaration or other supporting documentation establishes that Bras definitely intends to reinstate a business relationship with Pacific Bell in the near future. A history of business relationships in the past is no proof of intent to continue that relationship into the future.

Furthermore, the parroting of the phrase "ready, willing and able" in and of itself does not establish imminence. The Ninth Circuit makes much of this phrase, as well as a letter from Pacific Bell "indicating that Pacific Bell was pleased with his past work, would keep his information on file, and would consider him when it reevaluates its needs." *Bras,* 59 F.3d at 874, App. 12. This language of rejection is boilerplate, as anyone who has been rejected, laid off, or terminated can attest. This "evidence" in no way establishes the imminence required for Article III standing. If Bras is "ready, willing and able," there is nothing in the Code or Order that prevents him from going forward with a bid.

Bras' failure to state with specificity **when** he intends to offer his architectural services is a serious flaw in that it detracts from a showing of present intent to bid. Bras' statements amount to the "some day" intentions that this Court rejected in *Lujan*. The plaintiffs in *Lujan* submitted affidavits claiming an intent to revisit project sites at some time in the future where they presumably would be deprived of the opportunity to observe endangered animals. This Court has said that the expression of such an intent "is simply not enough. Such 'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan,* 504 U.S. at 564. The rationale behind the Court's insistence upon the injury being immediate is patently self-evident: "[W]e have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case to which no injury would have occurred at all." *Id.* at 565 n.2. Bras' alleged injury fails the immediacy test.

Moreover, Bras' claim is too speculative for Article III purposes. In the three years since Pacific Bell offered architectural contracts, many intervening events could have occurred. Pacific Bell could have changed its procurement program so that it would no longer be seeking a limited number of architectural firms with which to form business relationships, or it could have changed the way it administers its procurement program, events that are in no way connected to or mandated by the Code or Order. Indeed, what Pacific Bell may or may not do, now that the three years have elapsed, is completely speculative. In addition, Bras' intentions are similarly speculative. Bras may or may not be available or interested in bidding for Pacific Bell's or any other public utility's architectural contracts. In sum, Bras has failed to demonstrate a present, firm intent to bid. And any potential future injury that could occur is not of

sufficient immediacy to conclude that the alleged injury would be certain to happen again.

The Ninth Circuit relies on *Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville,* 508 U.S. ____, 113 S.Ct. 2297 (June 13, 1993) *("Northeastern")* to support its ruling that Bras has standing to challenge the Code and Order. *Bras,* 59 F.3d at 873, App. 11. That reliance is misplaced. The ordinance in *Northeastern* and the Code and Order at issue here are vastly different. The original Jacksonville ordinance provided that 10 per cent of the dollars spent each year on city contracts be **set aside** for minority or women businesses. Northeastern, 113 S.Ct. at 2299. A new ordinance was enacted which was also a **set aside** in that it allowed the city to reserve contracts for the **exclusive competition of minority and women businesses.** *Id.* at 2300. By contrast, the Code and the Order unequivocally do not authorize or encourage preferences or set asides. Nor do they have that effect in their operation.

Neither does the Code or Order erect "a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Id.* at 2303. Nothing in the Code or Order prevents Bras from bidding on any public utility contract under the same terms as any other bidder. The crux of Bras' claim is not that he did not have an equal opportunity to bid, but that he did not win a bid.[7] Bras' claim that he lost work and will continue to lose work because of the WMBE program is unfounded. Bras

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[7] Pacific Bell's Mr. Behuresht stated in his deposition that even if the WMBE factor had been eliminated, Bras may not have won a bid. The selection of bid winners was not done strictly on a mathematical basis. E.R. 70-72, App. 103-105. Pacific Bell "put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these types of services." E.R. 72, App. 105. Additionally, the size of Bras' small firm did not lend itself to handling the size of jobs that would be required of the limited number of firms with which

presented no evidence whatsoever to support this allegation. He pointed to no specific contract lost. *See Cone Corporation,* 921 F.2d at 1206. Moreover, any loss alleged has nothing to do with the Code or the Order. Bras presented no evidence that Pacific Bell would not have limited the number of architectural firms it used, notwithstanding the existence of the Code or Order.

B. By Reaching the Merits of Bras' Claim, the Ninth Circuit Exceeds the Sole Issue Before It and Enlarges the Court's Jurisdiction Where None Exists.

This Court has said that "Article III [standing] . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated. . . ." *Valley Forge Christian College,* 454 U.S. at 476. By addressing the merits of Bras' suit, the Ninth Circuit appears to have accommodated Bras' desire to have these matters adjudicated notwithstanding his failure to satisfy the jurisdictional requirement of injury-in-fact.

The sole issue before the Ninth Circuit was whether Bras had standing to pursue the equal protection claims he alleges in his lawsuit. While claiming that "[w]e express no opinion as to whether the Code or Order discriminates against Bras on the basis of race or gender," the Ninth Circuit's decision does just that. *Bras,* 59 F.3d at 875, App. 16. The Court stated that:

> [w]e are also unmoved by the Commission's argument that the Code and Order do not require public utilities to adopt discriminatory programs. While the Code and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-

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Pacific Bell would do business under its streamlined procurement program.

> asides, they clearly have the practical effect of requiring them to do so.

Id. App. 15. This "practical effect" test is a novel one, and the Ninth Circuit cites no established legal standard for its wayward proposition.

The Ninth Circuit's decision far exceeded the standing issue which was the sole issue before it, by delving erroneously into the merits of Bras' claim. By so doing, it went beyond the bounds of federal court jurisdiction. Rather than concentrate on Bras' standing, the court forged ahead with a discussion of the substantive issues. By commenting on the merits of the case, the Ninth Circuit lost sight of the fundamental requisites essential for Article III standing. It papered over the standing issue in order to reach the controversial topic of affirmative action. Notwithstanding the timeliness of the topic, a federal court cannot run roughshod over jurisdictional requirements to address a claim if the plaintiff clearly does not have standing to bring the action. Bras is such a plaintiff.

III.

THERE IS NO CAUSAL NEXUS BETWEEN THE ALLEGED INJURY AND THE COMMISSION'S ENFORCEMENT OF THE CODE AND ORDER.

Even assuming *arguendo* that Bras satisfied the injury-in-fact prong, he still lacks standing under the well-settled rule that there must be a causal connection between the injury and the conduct complained of and that the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Supreme Court has accommodated allegations of threatened injury in two settings where governmental

action is involved. *Wilderness Soc'y v. Griles,* 824 F.2d 4 (D.C. Cir. 1987). "The first setting involves cases in which the plaintiff alleges that governmental action will be taken directly against him." *Id.* at 11. The second setting, which is pertinent here,

> comprises cases in which the government acts directly against a third party, whose expected response in turn will injure the plaintiff. The standing question in these three-party cases frequently turns not on the existence of personal injury but rather on so-called causation issues, i.e., whether the third party's decision is sufficiently dependent upon the governmental action that plaintiff's injury is "fairly traceable" to that action and is "likely to be redressed" by an order binding the government.

Id. (footnote omitted). The plaintiff here is directly challenging the Code and Order, which solely establish voluntary goals and which absolutely **do not** compel regulated utilities to discriminate in their procurement of contracts and services. Here, it is the allegedly discriminatory **independent** actions of Pacific Bell, a utility regulated by the Commission, which are at issue, **independent** actions which were not dictated to by either the Code or Order.

The Ninth Circuit has failed to distinguish the facts of the instant case from *Coral Construction,* 941 F.2d at 910, and *Associated Gen. Contractors of California v. Coalition for Economic Equity,* 950 F.2d 1401 (9th Cir. 1991), *cert. denied,* 112 S.Ct. 1670 (1992), (*"AGCC II"*). In those cases, unlike here, the **government itself** adopted a program which **awarded** contracts that expressly included "bid preferences" or "set-asides" for minority and women-owned businesses. Here, in contrast, the Commission was not involved in any way in the procurement or award of contracting services to Bras, but has simply adopted an Order establishing general goals. Under the Code and Order, all

bidders have an equal opportunity to compete for utility contracts. The Code and Order do not set-aside any portion of utility procurement for the exclusive competition of WMBEs. Bras' action against Pacific Bell challenged the **utility's** contracting program implementing the Commission's Order. Bras settled that action. Bras' action against the Commission challenges only the Commission's Code and Order which solely establish goals.

In *Lujan,* this Court addressed the difficulty of demonstrating standing in contexts where the government regulates the conduct of third parties:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated or (regulable) third party to the government action or inaction — and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of

> KENNEDY, J.); see also *Simon*, [426 U.S.] at 41-42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g. Warth*, [422 U.S.] at 505. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily "substantially more difficult to establish."

Lujan, 504 U.S. at 561-62.

The Ninth Circuit simply failed to address this critical difference, i.e., that the instant case involves a third party actor, not before the Court. The Ninth Circuit's decision, therefore, conflicts with *Lujan* and with its own precedent in *Coral Construction and AGCC II* by impermissibly expanding the reach of these cases to the regulatory context, where the independent third party actor, here Pacific Bell, is not before the court and where the Code and Order are not responsible for the alleged injury. Such a broad interpretation of standing will result in a needless waste of judicial resources and unnecessary litigation and completely undermines the case or controversy requirement of Article III of the U.S. Constitution. To find a sufficient causal nexus under such circumstances puts unwarranted burdens on governmental regulatory bodies which will be placed in the untenable position of being held responsible for the independent actions of regulated entities, in situations where such entities' actions are inconsistent with the regulations under which they are bound or even where such actions may be illegal. Counsel has found no case in which a court has found standing on the basis of an alleged injury caused by a state's general requirement that independent third parties establish WMBE goals, where the particular procurement program at issue was that of a third party not before the court. Bras has settled his suit with Pacific Bell. Bras cannot

prove a sufficient causal nexus between the contested measures and his asserted injury that is traceable to the Commission.

Indeed, the most troubling aspect of the Ninth Circuit's erroneous conclusion that there is a sufficient nexus between Bras' asserted injury and the Commission's actions is the total lack of factual support for its conclusion. The Ninth Circuit states that "[b]ecause the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order." *Bras,* 59 F.3d at 875, App. 16. The majority overlooked critical evidence in the record which convincingly demonstrates the exact **opposite** conclusion.

Without any evidence to support its conclusion, the Ninth Circuit boldly asserts its unfounded conclusion that "[w]hile the Code and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so." *Id.*, App. 15. Not only is there no support in the record for this conclusion, but it completely misrepresents the Commission's WMDVBE program. Furthermore, the Ninth Circuit relies upon *Coral Construction and AGCC II* for the proposition that plaintiffs alleging equal protection violations need not demonstrate that rigid quotas make it impossible for them to compete for any given benefit, rather, they need only show that they are forced to compete on an unequal basis. *Id.* at 873, App. 10. Yet, inexplicably, the Ninth Circuit decision fails to address the fact that the statutory scheme set forth in the Code and Order provides that all bidders in utility

procurement compete on an equal basis.[8]The Ninth Circuit has overlooked conclusive evidence in the record that demonstrates the Commission's commitment to non-discrimination in its WMDVBE program. Each utility has its own program, with its own unique provisions. The Commission has not hesitated to evaluate the legality of specific provisions of a utility's program when the issue has come before the Commission. Indeed, in a previous decision, in response to a complaint filed with the Commission against Pacific Bell alleging discrimination, the Commission held that a utility which targets a particular minority group as the recipient of an advertising campaign may not limit its search for a WMBE advertising agency to an agency that is at least 51 percent owned and operated by members of the target group. *Muse Cordero Chen, Inc. v. Pacific Bell,* D.90-10-032, 38 Cal.P.U.C.2d 5 (1990), E.R. 159-169, App. 116-128. In that decision, the Commission differenti-

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[8] Notably, the *Bras* dissent argued that the challenged measures are different in critical ways from Jacksonville's program in *Northeastern,* 508 U.S. at ____, 113 S.Ct. at 2297, relied upon by the majority. The dissent stated that:

> [t]he Court noted that "in the context of a challenge to a set-aside program, the 'injury-in-fact' is the inability to compete on an equal footing in the bidding process. . . ." Therefore, the Court concluded, "a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." The Code and Order do not foreclose competition on an "equal footing," and they do not constitute a "discriminatory policy." The provisions themselves only require that utilities set goals, and "[a] goal is neither a requirement nor a quota." Cal. Pub.Util.Code § 1.3.13. [sic] [Order § 1.3.13]. Therefore, Bras cannot show that the Code or Order will injure him.

Bras, 59 F.3d at. 877-78 (citations omitted), App. 20-21.

ated between its statutes and regulations, and Pacific Bell's actions in violation thereof:

> Once again, we emphasize that while a utility may not arbitrarily exclude a class of persons on grounds unrelated to their qualifications, the utility retains its authority to use its legitimate business judgment to select the best person for the work at hand. Advertisers from the targeted community may have a natural advantage regarding cultural sensitivity. But members of all racial ethnic and national origin classifications must be allowed to compete; no one can be excluded because of an assumption that one class of persons is unable to understand another.

Id. (emphasis added), E.R. 168, App. 125-126. In addition, the Commission has also stated in a decision regarding inclusion of natural gas purchases in the WMBE program:

> We understand the concern that natural gas market uncertainty makes it impossible for utilities to be sure they can meet such a long-term goal, thus we remind the utilities that goals are just that — goals, and that if a utility cannot meet the goals it need only provide a reasonable explanation of its failure to do so. We emphasize that GO 156 does not create a set aside program for WMBEs, but rather simply opens the door for them to compete with established utility suppliers. If WMBEs cannot provide a needed product or service at a competitive price, they should not get the business.

Re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises, D.90-12-027, 38 Cal. P.U.C.2d 384, 394 (1990). Clearly, the Code and Order do not require utilities to adopt any particular scheme, and clearly **do not** have the "practical effect" of

requiring utilities to adopt discriminatory programs. The dissent correctly perceived this fatal flaw in the majority's reasoning:

> The Code and the Order do nothing more than to require utilities to set goals for hiring women and minority contractors. The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs. ¶ The majority theorizes that because some utilities may have had nondiscriminatory outreach programs in place before the Code and Order were adopted, the "clear message" the Code and Order "may have sent" is that those programs were insufficient. The majority offers no legislative history, case law, affidavits nor any other evidence to support the majority's conjecture. Just as plausible an explanation is that the legislature wanted the utilities to direct their already sufficient efforts toward specific goals. ¶ Bras is challenging the actions of the Commission. The Commission's actions are not discriminatory, and there is not a sufficient nexus between the state's provisions and any future injury that Bras may incur from a utility's specific program.

Bras, 59 F.3d at 978-79, App. 23.

Bras simply cannot prove a sufficient causal nexus between any asserted future injury traceable to the Commission. Standing cannot be supported unless the injury alleged is fairly traceable to the government conduct that is challenged as unlawful. *See Allen v. Wright,* 468 U.S. at 757 (IRS' failure to deny tax-exempt status to discriminatory schools not fairly traceable to asserted injury); *Simon v. Eastern Kentucky,* 426 U.S. at 42-43 (hospitals' denial of care to indigent patients not fairly traceable to IRS ruling regarding hospitals' charitable corporation); *DeBolt v. Espy,*

47 F.3d 777 (6th Cir. 1995) (private developers' eviction of plaintiff not fairly traceable to Farmers Home Administration's ("FmHA") (housing policies).[9] Indeed, the requisite links in the chain of causation between the Code and Order and any potential future asserted injury are far too weak for the chain as a whole to sustain Bras' standing. *Allen,* 468 U.S. at 759.

CONCLUSION

Petitioner, the Commission, respectfully prays the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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November 13, 1995

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[9] *DeBolt* is especially relevant here, because, in DeBolt as in the instant case, plaintiff settled with the third party actors and continued in her claims against the FmHA.

APPENDIX

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LEGAL DIVISION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,

Plaintiff-Appellant,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Defendant-Appellee.

No. 93-15764
D.C. No.
CV-92-00304-WHO
OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted
December 13, 1994—San Francisco, California

Filed July 5, 1995

Before: J. Clifford Wallace, Chief Judge, Harry Pregerson and Robert R. Beezer, Circuit Judges.

Opinion by Chief Judge Wallace;
Dissent by Judge Pregerson

SUMMARY

Individual Rights/Constitutional Rights/ Civil Litigation and Procedure

The court of appeals reversed a district court judgment and remanded. The court held that a provider of architectural services has standing to seek declaratory and injunctive relief against the California Public Utilities Commission forbidding the Commission from implementing provisions of a "minority and women business enterprise" program.

The Women and Minority Business Enterprise Law, codified at § 8281-8286 of the California Public Utilities Code, requires certain electrical, gas and telephone corporations to submit annual plans for increasing women, minority and disabled veteran business enterprise procurement. The Code requires that annual plans be submitted by utilities that include short-term and long-term goals, but not quotas, and methods for encouraging prime contractors and grantees to engage women, minority and disabled veteran businesses in subcontracts. The California Public Utilities Commission implemented General Order 156, which requires utilities to set "substantial and verifiable" short-term, mid-term and long-term goals for utilizing minority businesses. The Order directs that a utility establish initial minimum long-term goals for major categories of products and services the utility purchases from outside vendors of not less than 15 percent for minority owned businesses and not less than five percent for women owned businesses. Although a utility may not be automatically sanctioned solely for failing to meet goals, the Commission may sanction a utility for failing to make acceptable progress in the hiring of minority businesses.

Appellant J. Bras provided architectural services to Pacific Bell. He was asked to complete a "pre-qualification criteria" form which was to be used by Pacific Bell to select a group of architectural firms to submit proposals and, if

selected, to enter into "improved business partnerships." Question 10 on the form asked if Bras was currently certified for Minority/Women Business Enterprise status. Bras answered the question in the negative and returned the form to Pacific Bell.

Pacific Bell informed Bras that Bras ranked sixth amongst the firms that had completed the forms, and Pacific Bell initiated negotiations with the top three ranked firms. Bras was informed that he would have ranked third had question 10 not been considered. The firm that finished third in the ranking was a minority-owned business. A Pacific Bell representative wrote to Bras, stating that the company will be happy to consider him in the future when its contract for architectural services is reevaluated.

Bras filed an action against Pacific Bell and the Commission, alleging that Pacific Bell discriminated against him on the basis of race and sex in violation of the Equal Protection Clause of the United States Constitution. Bras also charged that § 8281-8286 and Order 156 were unconstitutional and should be declared void. He sought a permanent injunction forbidding the Commission from implementing the provisions.

Bras settled his claims against Pacific Bell. The district court dismissed his remaining claims for declaratory and injunctive relief against the Commission for lack of standing. Bras appealed.

[1] Bras met his burden of demonstrating that he was "able and ready to bid on contracts" and that a discriminatory policy prevented him "from doing so on an equal basis." Bras may fill out a new qualification form when the three-year term of Pacific Bell's present business relationships expires. [2] Bras stated in his summary judgment declara-

tion that he desired to reinstate his business relationship with Pacific Bell in the future, and was "ready, willing and able" to provide services to Pacific Bell. Bras also submitted a letter from Pacific Bell indicating that the company will consider him when it revaluates its needs. This evidence was sufficient to establish, for purposes of summary judgment, that Bras would suffer future injury if the program was not enjoined.

[3] The Code and Order were not immunized from scrutiny because they purported to establish "goals" rather than "quotas." The economic realities of the program are to be looked at, rather than the label attached to it. [4] While in this case the Code and Order did not expressly state that public utilities had to adopt any particular programs such as bidding preferences or set-asides, they clearly had the practical effect of requiring them to do so. [5] Because the Code and Order effectively encouraged, if not compelled, Pacific Bell to adopt discriminatory programs, there was a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order.

[6] Bras satisfied his burden of showing injury in fact and he had standing to seek declaratory and injunctive relief against the Commission.

Circuit Judge Pregerson dissented, stating that Bras cannot demonstrate future harm caused by the actions of the Commission.

COUNSEL

Pamela A. Lewis, Schneider & Wallerstein, San Jose, California, for the plaintiff-appellant.

Timothy E. Treacy, Public Utilities Commission of the State of California, San Francisco, California, for the defendant-appellee.

OPINION

WALLACE, Chief Judge:

Bras appeals from the district court's summary judgment in favor of the California Public Utilities Commission (Commission), dismissing his equal protection claims for lack of standing. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We reverse and remand.

I

From 1969 to 1991, Bras provided architectural services to Pacific Bell. Approximately 30 percent of Bras's gross receipts after 1983 came from work generated by Pacific Bell. On February 1, 1991, Bras was asked to complete a "pre-qualification criteria" form. The form was to be used by Pacific Bell to select a group of architectural firms to submit proposals and, if selected, to enter into "improved business partnerships." Question 10 on the form asked: "[A]re you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status?" Bras completed the form, answering question 10 in the negative, and returned the form to Pacific Bell on February 4, 1991.

In June 1991, Bras was informed by Pacific Bell that a business decision was made to work closely with a small number of suppliers in the San Francisco Bay Area and to develop working relationships with those firms over a period of time. Bras was told that Pacific Bell chose these suppliers

based on the information contained in the "pre-qualification criteria" form that Bras completed. Bras was also informed that 13 architectural firms had completed the forms, that Bras ranked sixth amongst all of those firms, that Pacific Bell initiated negotiations with the top three ranked firms, and that Bras would have ranked third instead of sixth had question 10 not been considered. In fact, however, Pacific Bell gave ten points for answering question 10 with a "yes" and zero points for answering question 10 with a "no." The firm that finished third in the ranking was a minority-owned business.

In response to Bras's inquiries concerning the selection process and the reason why he was eliminated from consideration for an "improved business partnership," a representative of Pacific Bell wrote to Bras, stating: "I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance.... Again, I appreciate your interest and the many contributions to our business. We plan to maintain your information on file and will be happy to consider Bras & Associates when our contract for architectural services is reevaluated in the future."

On January 10, 1992, Bras filed this action pursuant to 42 U.S.C. §§ 1981, 1983, and 1985 against Pacific Bell and the Commission. Bras alleged that Pacific Bell discriminated against him on the basis of race and sex in violation of the Equal Protection Clause of the United States Constitution. Bras also charged that sections 8281-8286 of the California Public Utilities Code (Code) and the Commission's General Order 156 (Order) are unconstitutional and should be declared void, and sought a permanent injunction forbidding the Commission from implementing these provisions.

For many years, the Commission has overseen programs to increase the participation of minority-owned and women-owned businesses in public utility contracting. Before 1986, the Commission simply required public utilities to maintain public outreach programs which encouraged and assisted minority-owned and women-owned businesses to compete for contracts with public utilities. In 1986, however, the California Legislature passed the Women and Minority Business Enterprise Law, which is codified at sections 8281-8286 of the Code.

Section 8283(a) requires "each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars . . . to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories." Cal. Pub. Util. Code § 8283(a) (West 1993). A "minority business enterprise" is one where at least 51 percent of the enterprise is owned by a minority group or groups. *Id.* § 8282(b). Utilities are required by the Code to "presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans." *Id.* The Code also requires that annual plans be submitted by utilities that include "short- and long-term goals and timetables, but not quotas, and . . . methods for encouraging both prime contractors and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts." *Id.* § 8283(b). The Commission is directed to "establish guidelines" to help utilities establish programs pursuant to the Minority Business Enterprises section of the Code. *Id.* § 8283(c).

Pursuant to Code § 8283(c), the Commission implemented the Order, which requires utilities to set "substantial and verifiable short-term (one year), mid-term (three

years), and long-term (five years) goals for the utilization of" minority businesses, *Id.* § 8. It specifically directs that "[e]ach utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." *Id.* § 8.2. A "goal" is defined as a "target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." *Id.* § 1.3.13. Although a utility cannot automatically be sanctioned solely for failing to meet goals, the Commission may, after conducting an investigation, sanction a utility for failing to make acceptable progress in the hiring of minority businesses, *Id.* § 8.12. The Commission concedes that it could sanction a utility by reducing its rate of return.

Bras settled all of his claims against Pacific Bell. On November 25, 1992, the settlement agreement was placed under seal by the district court. Bras's only remaining claims are for declaratory and injunctive relief against the Commission. The district court dismissed these claims for lack of standing.

II

We review the district court's summary judgment de novo. *First Pacific Bank v. Gilleran*, 40 F.3d 1023, 1024 (9th Cir. 1994). Our role is to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there is a genuine issue of material fact for trial and whether the district court correctly applied the law. *Id.* We may affirm on any ground supported by the record even if it differs from that of the district court. *Id.*

There are three requirements for Article III standing: (1) injury in fact, which means an invasion of a legally

protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (*Lujan*). The party invoking federal jurisdiction bears the burden of establishing each of these elements. *Id.* "Each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* In order to defeat a summary judgment motion, the nonmoving party may not simply rely on his pleadings but must present some evidence on every material issue for which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Thus, Bras will defeat summary judgment if he has presented some evidence establishing each of the three requirements for Article III standing.

III

The Commission contends that Bras failed to meet the "injury in fact" requirement because he has not demonstrated the loss of any future business. The Commission argues that there is no evidence that Bras intends in the future to bid on work for Pacific Bell or any other public utility subject to the Code or Order, and that Bras has, in any event, been excluded from consideration by Pacific Bell as a result of the settlement.

Because Bras seeks declaratory and injunctive relief only, it is insufficient for him to demonstrate that he was injured in the past; he must instead show a very significant possibility of future harm in order to have standing. *Coral Construction v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) (*Coral Construction*), *cert. denied*, 502 U.S. 1033 (1992).

In both *Coral Construction* and *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) (*Associated General*), *cert. denied*, 112 S. Ct. 1670 (1992), we concluded that contractors had standing to challenge programs that gave preferences to minority- and women-owned businesses for public contract awards. The programs essentially gave minority- and women-owned businesses a 5% bidding preference. In other words, the lowest bid would be accepted unless a minority- or women-owned business was within 5% of the bid price. *See Coral Construction*, 941 F.2d at 914; *Associated General*, 950 F.2d at 1404. In both cases, we concluded that the plaintiffs did not have to prove that they would lose any bids or identifiable contracts in order to sustain actual injury. We explained in *Coral Construction* that "[a]s a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when Coral Construction actually loses a bid, but every time the company simply places a bid." 941 F.2d at 930. Similarly, in *Associated General* we stated: "the mere fact that [Associated General] members cannot play on an even field against [Minority Business Enterprises] subjects them to a legally cognizable injury." 950 F.2d at 1407. Under *Coral Construction* and *Associated General*, plaintiffs alleging equal protection violations need not demonstrate that rigid quotas make it impossible for them to compete for any given benefit. Rather, they need only show that they are forced to compete on an unequal basis.[4]

The Supreme Court recently adopted our analysis of the injury in fact requirement as it applies in equal protection cases in *Northeastern Florida Contractors v. City of Jacksonville,* 113 S. Ct. 2297 (1993) (*Northeastern Florida*). The Supreme Court stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. at 2303. Under *Northeastern Florida,* Bras need only demonstrate that he is "able and ready to bid on contracts and that a discriminatory policy prevents [him] from doing so on an equal basis." *Id.*

[1] We conclude that Bras has met this burden. Bras's complaint and summary judgment declaration do not assert that he presently intends to submit bids to Pacific Bell. However, Bras cannot presently "bid" on future projects for Pacific Bell because Pacific Bell has entered into long-term business relationships with three architects that are now used for all of its architectural service needs. Bras can, however, fill out a new qualification form when the three-year term of Pacific Bell's present business relationships expires. That Bras can only compete for long-term contracts every several years rather than on a project-by-project basis does not change the analysis.

[2] Bras states in his summary judgment declaration, which was subsequent to his settlement with Pacific Bell, that: "I *earnestly desire* to reinstate my long term business relationship with Pacific Bell . . . in the future and *stand ready, willing and able* to provide such services should I be given an opportunity to do so." (Emphasis added.) Bras also submitted a letter from Pacific Bell indicating that Pacific Bell was pleased with his past work, would keep his information on file, and would consider him when it reevaluates its needs. This evidence is sufficient to establish, for purposes of summary judgment, that Bras will suffer future injury if the program is not enjoined.

In deciding whether Bras has standing, we must consider the allegations of fact contained in Bras's declaration and other affidavits in support of his assertion of standing. *See Warth v. Seldin,* 422 U.S. 490, 501 (1974) (*Warth*). We are required to view the evidence in the light most favorable to Bras because we are reviewing a summary judgment entered against him on the basis of lack of standing. *Fors v. Lehman,* 741 F.2d 1130, 1132 (9th Cir. 1984); *see also Warth,* 422 U.S. at 501 (when addressing motion to dismiss for lack of standing, both district court and court of appeals must accept as true all material allegations of the complaint and must construe the complaint in favor of the party claiming standing). Thus, we must presume that Bras's declaration is truthful and that he is willing, ready, and able to do work for Pacific Bell in the future should he be given the opportunity. Nothing in the record indicates that this is not so. Viewing the evidence in the light most favorable to Bras, we must also accept as true the evidence in the record that Pacific Bell was satisfied with Bras's past performance and that it promised to keep his information on file and to consider him when Pacific Bell reevaluates its needs. This evidence shows that there will be future competitions to

provide architectural services to Pacific Bell and that Bras will be eligible to participate. There is no evidence in the record indicating that the settlement with Pacific Bell prevents Bras from competing for future contracts. Moreover, Bras would have been one of the three firms considered for work by Pacific Bell had Pacific Bell not been forced to implement a Minority Business Enterprise program under the Code and Order. Given all of this evidence, we cannot assume that Bras would suffer no future injury by the ongoing implementation of the program. To the contrary, viewed in the light most favorable to Bras, the evidence indicates that there is a significant likelihood that he will suffer future injury if the program is not enjoined.

IV

The Commission further contends that Bras lacks standing because the Code and Order do not themselves contain any race or gender specific discriminatory devices such as preferences or set-asides pursuant to which Bras could be denied equal treatment. Although the Commission couches this argument in terms of the "injury in fact" requirement, this argument implicates not only the "injury in fact" requirement but also the interrelated requirements that there be a causal relationship between the injury and the challenged conduct and that the injury will be redressed by a favorable decision. *Lujan,* 112 S. Ct. at 2136.

[3] The Code and Order are not immunized from scrutiny because they purport to establish "goals" rather than "quotas." We look to the economic realities of the program rather than the label attached to it. During the pendency of the *Northeastern Florida* litigation, a new ordinance was adopted that "established 'participation goals' ranging from 5 to 16% ... [and] provides not one but five alternative

methods for achieving the 'participation goals.' " *Id.* at 2300. Nevertheless, the Court explained that the replacement of the old statue with the new one did not make the case moot, because "[t]he gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors . . . it disadvantages them in the same fundamental way." *Id.* at 2301. The ordinance at issue in *Northeastern Florida* did not *require* the use of set-asides, it merely authorized them. The Code and Order at issue here do nothing less. As *Northeastern Florida* shows, the relevant question is not whether a statute "requires" the use of such measures, but whether it authorizes or encourages them.

Other circuits, both prior to and since *Northeastern Florida,* have also concluded that the label attached to the program does not change the standing analysis. In *Concrete Works of Colorado v. Denver,* 36 F.3d 1513 (10th Cir. 1994), *cert. denied,* 115 S. Ct. 1315 (1995), the Tenth Circuit concluded that a nonminority prime contractor had standing to challenge a Denver ordinance that established "goals" for minority participation in city projects. The ordinance in *Concrete Works* directed the Office of Contract Compliance "to establish goals, on a project-by-project basis, for the participation level of [Minority and Women Business Enterprises] in city projects." *Id.* at 1516. Project goals were not required for every project, and project goals were often set at levels below the annual goals level. A prime contractor owned by a white male brought an action seeking both damages and injunctive relief. The Tenth Circuit correctly explained that "so long as the nonminority contractor can show that it was 'able and ready to bid' on a contract subject to the ordinance, the requisite 'injury in

fact' under Article III arises from an inability to 'compete [with minority contractors] on an equal footing' due to that ordinance's discriminatory policy." *Id.* at 1518, *citing Northeastern Florida,* 113 S. Ct. at 2303. *Concrete Works* further supports the conclusion that a program that establishes "goals" rather than rigid "quotas" can still cause "injury in fact." *See also Adarand Constructors v. Pena*, 63 U.S.L.W. 4523 (U.S. June 12, 1995) (nonminority subcontractor has standing to challenge the validity of a federal program pursuant to which prime contractors for highway projects were given an additional 1% of the bid price if the contractor met relevant "goals" for the hiring of minority subcontractors); *Harrison & Burrows Bridge Constructors v. Cuomo*, 981 F.2d 50 (2d Cir. 1992) (nonminority prime contractor had standing to challenge a state program requiring prime contractors to submit a "utilization plan" outlining the participation of minority and women-owned businesses and requiring such contractors to make "good faith efforts" to comply with project "goals" established by the contracting agency).

[4] We are also unmoved by the Commission's argument that the Code and Order do not require public utilities to adopt discriminatory programs. While the Code and Order do not expressly state that public utilities must adopt any particular programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so.

[5] The Order requires utilities to establish "substantial and verifiable" short-term, medium-term, and long-term goals, and to set a minimum initial long-term "goal" of purchasing at least 15% of each major category of products and services from minority-owned businesses and 5% from women-owned businesses. The Commission also monitors

each utility's "progress" and can sanction a utility for failing to make acceptable progress by reducing its rate of return. Considering that the utilities already had nondiscriminatory outreach programs in place to encourage and assist minority-and women-owned businesses to compete for contracts before the adoption of the Code and Order, the clear message sent to the utilities by their adoption may have been that racially neutral outreach programs were insufficient. Because the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order.

V

[6] We express no opinion as to whether the Code or Order discriminates against Bras on the basis of race or gender. All we hold is that he has standing to raise the claims. Bras, like any person alleging discrimination, must satisfy no less or more than what Article III requires. We conclude that Bras has satisfied his burden of showing injury in fact and that he has standing to seek declaratory and injunctive relief against the Commission.

REVERSED AND REMANDED.

PREGERSON, Circuit Judge, dissenting:

As a plaintiff who seeks injunctive or declaratory relief, Jack Bras "must show 'a very significant possibility' of future harm in order to have standing to bring suit." *Coral Construction Co. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) (quoting *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990)), *cert. denied*, 112 S. Ct. 875 (1992). Because Bras cannot demonstrate future harm caused by

the actions of the California Public Utilities Commission ("Commission"), I dissent.

The majority relies on *Northeastern Fla. Gen. Contractors v. Jacksonville*, 113 S. Ct. 2297, 2303 (1993), for its contention that Bras, who settled with Pacific Bell, has standing in his lawsuit against the Commission to challenge provisions—General Order 156 ("Order") and Cal. Pub. Util. Code § 8283 ("Code")—that require contractors to establish goals for women and minority participation in California public contracting. The original Jacksonville ordinance at issue in *Northeastern*, 113 S. Ct. at 2303, provided that 10 percent of the amount spent each year on city contracts be set aside for minority or women businesses. After the Supreme Court granted certiorari, Jacksonville repealed the ordinance and replaced it. The new ordinance set goals for minority and women contractor participation and specified five methods for achieving those goals. The city decided which method it would use on a contract by contract basis. One of the methods, the "Sheltered Market Plan," was a " 'set-aside' by another name," which allowed the city to reserve contracts for the exclusive competition of minority and women businesses. *Id.* at 2301. The Court held that "when the government erects a barrier" that gives one group an advantage in obtaining a benefit, someone not in that group seeking to challenge that barrier does not need to allege that he or she would have obtained the benefit but for the barrier. The Court reasoned that the "injury in fact" in that type of an equal protection case is the denial of equal treatment, not the ultimate inability to obtain the benefit. *Id.* at 2303.

Northeastern does not support the majority's position that Bras has standing in this action against the Commission. First, Bras cannot prove an "injury in fact." He cannot show

a "very significant" possibility of future injury because any possibility of injury is too speculative to warrant judicial scrutiny. Further, because the Code and Order do not "erect[ ] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," *id.*, the provisions do not disadvantage Bras. Second, Bras cannot fulfill another requirement of standing, the necessary causal nexus between his alleged injury and the defendant's conduct.

I.

Bras's future injury is too "hypothetical" to warrant judicial review. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947): First, and most important, there are no current Pacific Bell projects on which Bras can bid. The majority notes that Pacific Bell has already entered into three-year contracts with several architects. The first time Bras will have a chance even to apply to be a candidate for an "improved business relationship" is at the end of Pacific Bell's *three year cycle.*

In contrast, the regular bidding process in *Northeastern* meant that the contractors would bid, and therefore be injured, again in the very near future. In *Northeastern*, the Supreme Court found that "[i]n its complaint, petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able." *Northeastern*, 113 S. Ct. 2304. In fact, the Court distinguished an earlier Supreme Court case, *Warth v. Seldin*, 422 U.S. 490, 516 (1975), on this basis. The Court explained, that unlike the contractors in *Northeastern*, the plaintiffs in *Warth* did not have standing because they did not allege that any contractor "ha[d] applied . . . for a

building permit or a variance with respect to any *current* project." *Northeastern*, 113 S. Ct. at 2304 (emphasis added) (quoting *Warth*, 422 U.S. at 516). The Court concluded that, unlike the petitioner in *Warth*, the contractors in *Northeastern* alleged an injury of "sufficient immediacy" to warrant standing. *Id.* (quoting *Warth*, 422 U.S. at 516).

Here no Pacific Bell project is "currently proposed," and Bras cannot show an injury of "sufficient immediacy." *Id.* (quoting *Warth*, 422 U.S. at 516). A delay of three years makes Bras's alleged injury unreasonably abstract. And because Bras did not allege that he planned to work with any other utility, his relationship with Pacific Bell is all we can evaluate. In short, Bras's alleged injury is not "actual or imminent," as it must be to form the basis for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

Moreover, Bras's future intentions are unclear. As the district court noted, Bras made no statement in his complaint that he intends to bid for future contracts from any public utility. His only statement to that effect came after he settled with Pacific Bell. In his declaration in support of his motion for summary judgment, Bras stated that he "earnestly desire[s]" to reinstate his long term business relationship with Pacific Bell and is "ready" and "able" to provide architectural services if he is given "the opportunity to do so." [E.R. 57] But Bras does not say that he *will apply* for another long term contract with Pacific Bell, and he does not specify *when* he will apply. In the context of an ongoing bidding process, contractors need only allege that they are "ready" and "able" to bid, because their regular conduct is sufficient evidence of their future intentions. *Northeastern*, 113 S. Ct. at 2303. Without such a process, however, these

words are insufficient. Plaintiffs, like Bras, must allege "concrete" plans and specify when they will expose themselves to injury again. *Lujan*, 504 U.S. at 564 (holding that plaintiffs who had no "current" or "concrete" plans to visit site where injury to them would occur did not have standing).

Last, Bras has failed to present any evidence to suggest that Pacific Bell would consider hiring him again after settling his claims. The majority refers to a letter Bras received from Pacific Bell, indicating that it would "maintain [his] information on file," [E.R. 119], but the opinion fails to note that Pacific Bell sent that letter *before* the parties reached a settlement. Thus, Bras has not shown an injury of "sufficient immediacy and ripeness to warrant judicial intervention." *Northeastern*, 113 S. Ct. at 2304 (quoting *Warth*, 422 U.S. at 516).

II.

Even if Bras could demonstrate that he would be in a position in the future to be injured by the Code and Order, he would not be able to prove "a very significant possibility" of future harm, *Coral Construction*, 941 F.2d at 929 (quoting *Nelsen*, 895 F.2d at 1250), because the challenged Code and Order in the instant case have not "erect[ed] a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Northeastern*, 113 S. Ct. at 2303.

The challenged measures are different in critical ways from Jacksonville's program in *Northeastern*. The Supreme Court based its holding in *Northeastern* expressly on the fact that the Jacksonville ordinance contained a set-aside program. The Court noted that "in the context of a challenge to a set-aside program, the 'injury-in-fact' is the inability to

compete on an equal footing in the bidding process. . . ." *Id.* Therefore, the Court concluded, "a party challenging a *set-aside program like Jacksonville's* need only demonstrate that it is able and ready to bid on contracts and that a *discriminatory policy* prevents it from doing so on an equal basis." *Id.* (emphasis added). The Code and Order do not foreclose competition on an "equal footing," and they do not constitute a "discriminatory policy." The provisions themselves only require that utilities set goals, and "[a] goal is neither a requirement nor a quota." Cal. Pub. Util. Code § 1.3.13. Therefore, Bras cannot show that the Code or Order will injure him.

The majority's contention, that the measures at issue are similar to the program in *Northeastern* because both "authorize" the use of set-asides but do not require them, is specious. First, in *Northeastern*, the set-aside program was an explicit option which the defendant, the *city itself*, could employ at any given time. In contrast, the defendant here, the Commission, does not operate any procurement programs whatsoever, discriminatory or otherwise. Second, nothing in the language of the Code or Order alludes to any type of set-aside scheme. The Supreme Court in *Northeastern*, 113 S. Ct. at 2303, based its conclusion on the fact that set-asides were an explicit option under the city ordinance. The contested measures here involve no preferences or quotas. They do not dictate the use of any particular programs and do not themselves constitute a program. They do not deny Bras, or anyone, equal treatment. In the instant case, unlike in *Northeastern*, the "government" has not "erect[ed] a barrier." *Id.*

Attempting to draw a further parallel to *Northeastern*, the majority states that "[w]hile the Code and Order do not expressly state that public utilities must adopt any particular

programs such as bidding preferences or set-asides, they clearly have the practical effect of requiring them to do so." The majority cites no evidence to support this conclusion, nor could it, as none exists in the record. Utilities are not "required" to adopt any particular scheme, only goals. Neither the Code nor the Order specify how those goals should be met nor even dictate that they be met. Utilities are free to adopt completely gender and race-neutral schemes. For example, a program that aided inexperienced contractors with the bidding process might have the effect of achieving the Code and Order goal of increasing women and minority participation in procurement while treating all inexperienced contractors, white and minority, men and women, exactly alike. Moreover, the criteria for successful bidders remain unchanged and are entirely race and gender neutral. If Bras were to participate under such a program, he would suffer no equal protection harm.

If Bras wanted to challenge a particular race or gender-conscious program, one that might "make it more difficult for members of one group to obtain a benefit than it is for members of another group," *id.*, he could bring an action against the utility that developed the program. But no utility is a defendant in this action; Bras settled all his claims with Pacific Bell and has not questioned any other utility's contracting policy. Bras's suit against the Commission only challenges the Order and the Code, measures that mandate goals alone.

III.

In addition to lacking a constitutionally adequate "injury in fact," Bras cannot prove a sufficient causal nexus between the contested measures and his injury. In other words, an

injury must be "fairly . . . trace[able] to the challenged action of the defendant . . . ." *Lujan,* 504 U.S. at 560.

The majority attempts to gloss over this issue by stating that "[b]ecause the Code and Order effectively encourage, if not compel, Pacific Bell to adopt discriminatory programs, there is a sufficient nexus between Bras's injury and the Commission's actions in enforcing the Code and implementing the Order." This conclusion is unsupportable. The Code and the Order do nothing more than to require utilities to set goals for hiring women and minority contractors. The provisions do not imply or suggest, and certainly do not compel utilities to use discriminatory programs.

The majority theorizes that because some utilities may have had nondiscriminatory outreach programs in place before the Code and Order were adopted, the "clear message" the Code and Order "may have sent" is that those programs were insufficient. The majority offers no legislative history, case law, affidavits nor any other evidence to support the majority's conjecture. Just as plausible an explanation is that the legislature wanted the utilities to direct their already sufficient efforts toward specific goals.

Bras is challenging the actions of the Commission. The Commission's actions are not discriminatory, and there is not a sufficient nexus between the state's provisions and any future injury that Bras may incur from a utility's specific program. Just as in *Allen v. Wright,* 468 U.S. 737, 759 (1984), in which minority parents challenged the IRS's failure to deny tax-exempt status to discriminatory schools, here also the "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain . . . standing." In *Allen,* the Court noted that the minority children's inability to receive an integrated education was

related only by way of intermediary parties, the private discriminatory schools, and speculative reasoning as to the effect of the prevailing decisions. *Id.* at 758-59. The same is true here. Bras's future injury, if any, would be traceable to the contracting process of a utility, which very well may not be a product of the provisions he now challenges, and would not necessarily be changed if the Code and Order were struck down. *See also Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 42-43 (1976) (hospitals' denial of care to indigent patients not fairly traceable to IRS ruling regarding hospitals' charitable corporation tax status).

IV.

The likelihood of future injury in the instant case is far too remote to meet established constitutional standards. Standing is founded "in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth,* 422 U.S. at 498. When an individual seeks to avail himself of the federal courts to determine the validity of a legislative action, he must show that he "is immediately in danger of sustaining a direct injury." *Ex parte Levitt,* 302 U.S. 633, 634 (1937). This requirement is necessary to ensure that "federal courts reserve their judicial power for 'concrete legal issues, presented in actual cases, not abstractions.' " *Associated General Contractors of California v. Coalition for Economic Equity,* 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting *United Public Workers,* 330 U.S. at 89), *cert. denied,* 112 S. Ct. 1670 (1992). Bras offers us a hypothetical injury, abstract in nature. We should not exceed our judicial authority by holding that he has standing.

FILED
MAR 18 1993
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DO NOT PUBLISH

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,
Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,
Defendants.

No. C-92-0304 WHO

MEMORANDUM DECISION AND ORDER

ENTERED IN CIVIL DOCKET MAR 24, 1993

Plaintiff, J. Jack Bras, individually and doing business as J. Jack Bras & Associates ("plaintiff"), brought suit against Pacific Bell, the California Public Utilities Commission ("CPUC"), and two individual defendants,[1] alleging that Pacific Bell's Women and Minority Business Enterprises program violated plaintiff's statutory and constitutional rights. Plaintiff alleged a conspiracy between Pacific Bell and the CPUC defendants, and alleged further that a provision of California's public utility law violates the Equal Protection Clause; that provision requires the CPUC to encourage certain public utilities, including Pacific Bell, to adopt plans that will increase economic opportunity for women, minorities, and disabled veterans.

Following a settlement conference before Magistrate Judge Joan S. Brennan, plaintiff and Pacific Bell settled. On November 25, 1992, the Court entered an order dismissing Pacific Bell and placing the record of the settlement conference under seal. Presently before the Court are plaintiff's and the CPUC defendants' cross-motions for summary judgment. For the reasons hereinafter stated, plaintiff's motion for summary judgment against the CPUC defendants is denied, the CPUC defendants' motion for summary judgment against plaintiff is granted, and the action is dismissed with prejudice.

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[1] The individuals, both of whom are named in their representative capacities, are Philip Bremond, MWBE Program Manager for the CPUC, and Neal Shulman, Executive Director of the CPUC. (The CPUC and Bremand and Shulman are referred to collectively as the "CPUC defendants.")

I.

A.

Plaintiff is a white male who earns his living as a licensed architect. From 1969 until early 1991, plaintiff provided architectural services to Pacific Bell. The relationship with Pacific Bell was a good one from plaintiff's perspective because approximately 30 percent of his gross receipts after 1983 were generated by dealings with Pacific Bell.

On February 1, 1991, Paula Knapp, a Pacific Bell contract manager, wrote to plaintiff and asked him to complete a "pre-qualification criteria" form. Knapp wrote that Pacific Bell was sending the form to all firms that had provided architectural services to Pacific Bell's real estate management organization in the Bay Area. Knapp informed plaintiff that Pacific Bell would use the responses to select a final group of architectural firms that would be asked to submit "comprehensive proposals." From that final group, Pacific Bell would select several Bay Area architectural firms with which it would enter into "improved business partnerships."

On February 4, 1991, plaintiff returned the completed "pre-qualification criteria" form to Pacific Bell. Question 10 of that form asked "are you currently certified through the Cordoba Corporation Clearing House process for Minority/ Women Business Enterprise status?" Plaintiff answered this question in the negative.

In June 1991, plaintiff wrote to Pacific Bell, complaining that he had noticed a decrease in his business with the company. The following month, Jack Behseresht, Pacific Bell's director of project management for real estate, responded to plaintiff's letter. Behseresht informed plaintiff that Pacific Bell had made a business decision to reduce the number of outside firms in the Bay Area it would retain for architectural services; according to Behseresht, Pacific Bell believed that successful business relationships could best be

developed by working closely with a small number of suppliers who would become Pacific Bell's "business partners" over a period of time. He informed plaintiff that the process Pacific Bell used to select the firms with which it would continue to do business included the information plaintiff had provided in the pre-qualification criteria form. Behsereshtalso informed plaintiff that his firm was very competitive and was not eliminated due to any unsatisfactory performance.

Plaintiff thereafter discovered that Pacific Bell had received "pre-qualification criteria" forms from thirteen architectural firms in the Bay Area. Pacific Bell converted the responses on these forms to a numerical scale, assigning different "weights" to the various criteria.[2] Pacific Bell totalled each firm's points and then "ranked" the thirteen firms from most to least total points; it then pursued negotiations with the top three firms. Plaintiff ranked sixth out of thirteen. He took issue with several of the evaluations given him,[3] but none more so than his evaluation on the "M/WBE" criterion.

The "M/WBE" criterion measured whether a firm qualified for minority or women business enterprise status. Pacific Bell determined the number of points a firm received for this criterion based on the firm's response to question 10 of the "pre-qualification criteria" form: if the firm answered "yes," it received 10 points; if the firm answered "no" (as plaintiff did), it received zero points. If the "M/WBE" criterion had not been used, and if all other criteria had been weighted as

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[2] Thus, Pacific Bell assigned a possible 25 points to the "Quality of Past Performance" and "Central Office Design Experience" categories, but only a possible 5 points to categories such as "Number of Years in Business" and "Size of Organization." The maximum score any firm could receive was 95.

[3] For example, plaintiff took issue with his score of 20.2, out of a possible 25, in the category "Quality of Past Performance."

they were in the final report, plaintiff would have finished third; hence, he would have been eligible to proceed to the next round of negotiations with Pacific Bell and possibly would have entered into an "improved business partnership" with it.[4] Intergraph, the firm that did finish third in the overall ranking (and that proceeded to the final selection process) is owned by George Grover, who is an Asian American. Intergraph received 10 points on the "M/WBE" criterion.

Plaintiff thought Pacific Bell's selection process more than unfair; he believed it was tainted by racial discrimination and violated his rights under the Fourteenth Amendment's Equal Protection Clause. On January 10, 1992, plaintiff filed this action under 42 U.S.C. §§ 1981, 1983, and 1985, against Pacific Bell, the CPUC, and two of the CPUC's officials.[5] Plaintiff claimed that Pacific Bell had discriminated against him, under color of state law, on the basis of his race, and that Pacific Bell's actions violated the Equal Protection Clause, § 1983, and two provisions of the California Constitution.

B.

With respect to the CPUC defendants, plaintiff took issue with the "Women and Minority Business Enterprises" section ("WMBE") of California's Public Utilities Code. Cal. Pub. Util. Code §§ 8281-8286 (West Supp. 1993). Section 8283(a) of the WMBE direct the CPUC to "require each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) . . . to submit annually, a detailed and verifia-

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[4] Although it is not certain that Pacific Bell would have selected plaintiff as a "finalist" had he ranked third, it is established that the three firms with the highest rankings all were selected as finalists.

[5] *See* note 1 *supra.*

ble plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories."[6] A "minority business enterprise" is

> a business enterprise that is at least 51 percent owned by a minority group or groups; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more than one minority groups, and whose management and daily business operations are controlled by one or more of those individuals.

Id. § 8282(b).[7] Utilities subject to this section of the WMBE (such as Pacific Bell[8]) "shall presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans." *Id.*

Section 8283(b) of the WMBE requires that the annual plans submitted by affected utilities include "short- and long-term goals and timetables, but not quotas, and . . . methods for encouraging both prime contractors and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts[.]" The CPUC is directed to "establish guidelines" for all affected utilities to utilize "in establishing programs pursuant to" the WMBE. *Id.* § 8283(c).[9]

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[6] As drafted in 1987, the WMBE made reference only to "women" and "minority" business enterprises. In 1990, the California Legislature amended the WMBE to include "disabled veteran" business enterprises.

[7] A "women business enterprise" is defined similarly. *See id.* § 8282(a).

[8] It is undisputed that Pacific Bell is a "telephone corporation with gross annual revenues exceeding twenty-five million dollars." *Id.* § 8283(a).

[9] The CPUC also is directed to "adopt criteria for verifying and determining the eligibility of women, minority, and disabled veteran business enterprises for procurement contracts." *Id.* § 8284(a).

Pursuant to § 8283(c), the CPUC promulgated and implemented General Order 156 ("General Order"), which includes rules governing the development of programs to increase the participation of women, minority, and disabled veteran business enterprises in accordance with the WMBE. Section 8 of the General Order requires affected utilities to set annually "substantial and verifiable short-term (one year), mid-term (three years), and long-term (five-years) goals for the utilization of WMBEs." "Substantial goals" are "goals which are realistic and clearly demonstrate a utility's commitment to increase WMDVBEs' share of the utility's purchases and contracts."

Section 8.2 of the General Order provides that "[e]ach utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." The "specification of initial long-term goals" in the General Order does "not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281(b)(1)(B) are awarding 30% or more of their contracts to WMBEs." The General Order defines a "goal" as "a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota."

Pacific Bell, which is subject to the WMBE and the General Order, has maintained its own women and minorities business enterprises program (in some form or another) since 1982. In accordance with the provisions of the WMBE and the General Order, Pacific Bell has submitted to the

CPUC annual reports, which detail Pacific Bell's WMBE "goals" and "performance" for each year.[10]

In his complaint, plaintiff alleged that Pacific Bell and the CPUC defendants "conspired . . . to deprive plaintiff of the equal privileges and immunities guaranteed under the 14th Amendment" by implementing the WMBE and the General Order "in a manner which substantially deprived plaintiff from continuing his long term business relationship with defendant PACIFIC BELL and resulting in a substantial loss of income arising out of the furtherance of said conspiracy." (Compl. ¶ 20.) Plaintiff sought two forms of relief from the CPUC defendants: (1) declaratory relief, in the form of a declaration that (a) the WMBE and (b) the General Order are unconstitutional, both on their face and as applied, and (2) injunctive relief in the form of a permanent injunction forbidding all defendants "from implementing the WMBE law, including General Order 156, in a manner which constitutes any race or sex discrimination against plaintiff and other white males similarly situated." (*Id.* ¶ 28.)

C.

Plaintiff settled all of his claims against Pacific Bell. On November 25, 1992, the Court entered an order dismissing plaintiff's claims against Pacific Bell and placing the record of the settlement conference under seal.[11] Plaintiff repre-

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[10] For example, Pacific Bell reported to the CPUC that its 1990 "goal" for minority business enterprises was 9.5 percent of its purchases from outside vendors, but its actual "performance" for that year was 9.1 percent.

[11] The settlement agreement itself is subject to a protective order. Apparently, the CPUC defendants have yet to see a copy of that agreement. On December 17, 1992, at a status conference before the Court, plaintiff's counsel represented that he would provide a copy of the agreement to the CPUC provided that the CPUC agreed to receive the

sents that 50 percent of the monetary consideration he received under the settlement compensated him for economic damages (i.e., his lost business with Pacific Bell), while the remaining 50 percent compensated him for noneconomic damages.

As a result of plaintiff's settlement with Pacific Bell, plaintiff's only remaining claims are against the CPUC defendants. Those claims, as noted above, are for declaratory and injunctive relief.

II.

A.

Plaintiff's constitutional argument is straightforward: he contends that neither the WMBE nor the General Order can withstand Equal Protection Clause analysis in light of the Supreme Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). In *Croson*, the Court held that a state or local governmental actor's use of racial classifications (including purportedly benign classifications) must be subjected to strict scrutiny. To survive strict scrutiny, any such classification must (1) serve a compelling governmental interest, and (2) be narrowly tailored to achieve that compelling interest. *Id.* at 493-94 (plurality opinion of O'Connor, J.); *id.* at 520 (Scalia, J., concurring in the judgment).

Although the CPUC defendants defend the WMBE and the General Order on the merits, they also raise two threshold arguments as to why this Court should avoid reaching the question whether the WMBE and the General Order are constitutional. First, the CPUC defendants argue that this Court should abstain from exercising jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Second, the

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agreement under the protective order. To date, the CPUC has not requested a copy of the settlement agreement from plaintiff's counsel.

CPUC defendants argue that because plaintiff has settled his claims against Pacific Bell, he no longer has standing to challenge the WMBE and the General Order. The first of these arguments plainly is without merit.[12] The standing argument, however, carries the day for the CPUC defendants.

B.

The CPUC defendants contend that plaintiff lacks standing to maintain this action. The Supreme Court has had a good deal to say in recent years on the necessary standing requirements:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or

[12] The Supreme Court has said that *Burford* abstention is warranted only

> (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc., v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). This case does not involve "difficult questions of state law": the state law at issue here (the WMBE and the rules promulgated thereunder in the General Order) is clear and definite. Nor can it be said that "the exercise of federal review" is likely to "disrupt" the state's "efforts to establish a coherent policy." Plaintiff's case does not involve "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors[.]" *Id.* at 362.

> imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.
>
> The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Luian v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (emphasis added) (citations, footnote, internal quotation marks, and internal alterations omitted). Plaintiff fails to satisfy the injury requirement.

This Court does not write upon a clean slate with respect to the standing issue in the context of an Equal Protection Clause challenge to a plan like the WMBE. In two recent cases, the Ninth Circuit has outlined the requirements for a plaintiff, such as the plaintiff in this case, to satisfy the injury prong of the Article III standing test.

The first case, *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992), concerned a challenge by a contractor ("Coral Construction") to King County's minority and women business enterprises program. That program was similar to the

one at issue here,[13] and Coral Construction alleged that (1) it had lost business because of the minority business enterprise ("MBE") part of the program, and (2) it stood to lose business because of the women business enterprise ("WBE") part of the program. With respect to the first allegation (MBE), Coral Construction sought damages as well as declaratory and injunctive relief. With respect to the second allegation (WBE), however, Coral Construction sought only declaratory and injunctive relief. This was because Coral Construction could allege that it actually lost a contract only as a result of the MBE program. Coral Construction did not allege that it actually had lost a contract because of the WBE program; rather, it alleged that it stood to lose future contracts because of the preferences given to WBEs.

The Ninth Circuit's analysis of Coral Construction's first challenge, to the MBE program, is not relevant to the standing issue here. The Ninth Circuit's discussion of Coral Construction's challenge to the WBE program is quite relevant because the court (on its own initiative) conducted a searching inquiry into whether Coral Construction had standing to maintain its claims for declaratory and injunctive relief.

After repeating the familiar three-part standing test, the Ninth Circuit turned to the injury component of that test:

> Where only injunctive or declaratory relief is sought, a plaintiff must show a very significant possibility of future harm in order to have standing to bring suit. The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract, and the alleged harm

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[13] Although there are differences between the King County program and the WMBE at issue here, those differences are not relevant to the standing inquiry.

> must be actual or imminent, not conjunctural or hypothetical. Moreover, a federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

Id. at 929 (emphasis added) (citations, internal quotation marks, and internal alteration omitted). The Ninth Circuit then took note of a recent Eleventh Circuit decision, which imposed significant limitations on a plaintiff's ability to claim an "injury" sufficient for standing purposes. *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S. Ct. 2238 (1991). The Ninth Circuit summarized *Cone Corp.* as follows:

> [T]he Eleventh Circuit considered Cone Corporation's challenge to an MBE program administered by the Florida Department of Transportation. The plaintiffs alleged that they had lost work as a result of the MBE program. However, the Eleventh Circuit observed that the plaintiffs alleged no facts to support this allegation; that is, they did not point to any specific contract they lost because the Secretary discriminated against them on account of their race. Likewise, the plaintiffs' allegations of future injury suffered the same infirmity; the plaintiffs merely concluded that, because of the Secretary's DBE requirements, they will be injured in their business or property. The [Eleventh Circuit] concluded that these bald conclusions were insufficient to give rise to standing, and that the court would decline to imagine an injury sufficient to give the plaintiffs standing where they have demonstrated none.

Coral Constr., 941 F.2d at 929 (emphasis added) (citations to *Cone Corp.*, internal quotation marks, and internal alterations omitted).

The Ninth Circuit observed that Coral Construction's complaint, "[a]t first blush," might appear to suffer "the

same standing infirmities" the Eleventh Circuit identified in Cone Corporation's complaint. *Id.* Coral Construction was unable to point to a single "contract lost to a woman-owned business." *Id.* Upon further analysis, however, the Ninth Circuit determined that Coral Construction's complaint's "injury" allegations were sufficient to survive the *Cone Corp.* test. Specifically, Coral Construction's complaint included the allegation that the company intended "to bid public contracts to be let by the defendant in the future." *Id.* (emphasis added) (internal quotation marks omitted). The Ninth Circuit also found that this allegation was supported by factual allegations in the complaint: "Coral Construction has a branch office in King County. Coral Construction specializes in guardrail installation, highway signing, and related work, all of which is virtually the exclusive domain of public agencies. It is highly probable that Coral Construction will again bid on work let by King County." *Id.* at 929-30 (emphasis added).

The second Ninth Circuit case that is relevant is *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991) ("*AGCC*"), *cert. denied*, 112 S. Ct. 1670 (1992). The *AGCC* case also concerned an equitable challenge to a WMBE program, the City and County of San Francisco's Minority/Women/Local Business Utilization Ordinance. Once again, the Ninth Circuit confronted the threshold question whether the plaintiff, an organization of construction contractors ("AGCC") had standing to pursue its case. Rejecting the arguments of an intervening party that AGCC had not alleged sufficiently a distinct and palpable injury, the Ninth Circuit found that

> the record indicates that AGCC members have firm intentions to bid for San Francisco city contracts, and that the application of the ordinance to the city bids is compulsory in nature. *See* [*Coral Constr.*], 941 F.2d

> [at 929-30]. The mere fact that AGCC members cannot play on an even field against MBEs subjects them to a legally cognizable injury: "[a]s a result of the objectively unequal bidding process under the preference method of awarding contracts, an injury results not only when [a non-MBE] actually loses a bid, but every time the company simply places a bid." Id. at 930.

Id. at 1407 (emphasis added) (third and fourth alterations in original). Thus, the Ninth Circuit's analyses of the injury requirement in *AGCC* and *Coral Construction* were virtually identical. In each case, the plaintiff, which had not alleged the actual loss of a contract (i.e., had not claimed damages), satisfied the injury requirement because it had alleged, and the record in the case supported its allegation, that it intended to bid on a contract in the future.

The same cannot be said of plaintiff in this case. Plaintiff did allege that he lost business as a result of the WMBE and the General Order: specifically, his lost account with Pacific Bell. That allegation was at the bottom of plaintiff's claim for damages against Pacific Bell. Plaintiff did not allege, however, that he might lose any future business because of either the WMBE or the General Order. Indeed, plaintiff did not allege, and there is nothing in the record to indicate, that plaintiff ever has done (or ever intends to bid for) any work for a utility, other than Pacific Bell, that is subject to the WMBE and the General Order.

If plaintiff had not settled his case against Pacific Bell, he might have a stronger case for standing with respect to his claims for declaratory and injunctive relief. Plaintiff might have been able to argue (although it is by no means likely that he would have succeeded) that the WMBE and the General Order prevented him from obtaining future business with Pacific Bell. Plaintiff's settlement, however, extinguished all of his claims with respect to Pacific Bell. There

is nothing wrong, of course, with plaintiff's decision to settle those claims; plaintiffs settle legitimate (and even potentially meritorious) claims involving weighty constitutional issues on a daily basis. Presumably, plaintiff weighed his prospects for success on his claims for compensatory, general, and punitive[14] damages against Pacific Bell's offer to compromise the case and decided to take the proverbial "bird in the hand."

The problem for plaintiff is that when he settled all of his claims against Pacific Bell, he released the only "hook" on which he could attempt to hang the remaining defendants. Plaintiff tries to escape this logic by asserting that his settlement with Pacific Bell compensated him only for his past economic loss. Thus, plaintiff argues that he

> has settled his claim against PACIFIC BELL for money damages, both non-economic (50%) and economic (50%) damages. As to the latter he views his recovery as compensation for past money damages only. However, [plaintiff's] exclusion from further participation in this process represents an ongoing injury which subjects him to the likelihood of imminent future harm.

(Pl.'s Mem. P. & A., at 12:1-6 (emphasis added).) How plaintiff "views" his settlement is, of course, irrelevant to the issue at hand. When plaintiff settled all of his claims against Pacific Bell, he essentially called things even with a former client. Plaintiff does not claim that as a result of the settlement, he and Pacific Bell might do business in the future.

For its part, Pacific Bell already has entered into "improved business relationships" with architectural firms in the Bay Area and plaintiff is not one of those firms. Plaintiff has

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[14] Plaintiff sought punitive damages in the amount of ten million dollars from Pacific Bell. (Compl. ¶ 30.)

neither alleged nor presented the Court with a shred of evidence that Pacific Bell would not have attempted to narrow the number of architectural firms it used in the absence of the WMBE and the General Order; nor has plaintiff presented any evidence that Pacific Bell would reevaluate its decision not to retain plaintiff for future business were the WMBE nullified.[15] Plaintiff's only legal complaint with the process Pacific Bell used to determine which firms it would continue to employ was that it should not have considered WMBE status as part of the equation. Plaintiff's settlement with Pacific Bell effectively extinguished that objection, and with it plaintiff's charge that the WMBE and the General Order interfered with his business opportunities in a constitutionally intolerable manner.

Finally, plaintiff's statement, repeated throughout his complaint, that he seeks declaratory and injunctive relief on behalf of himself and all other "similarly situated" white males does nothing to improve plaintiff's standing. (See Compl. ¶¶ 5, 26, 28, 33.) This is not a class action; hence, plaintiff has no standing to pursue this matter on behalf of all other "similarly situated" white males whose future business might be affected adversely by either the WMBE or the General Order.

III

Under the relevant Ninth Circuit authorities, *Coral Construction* and *AGCC*, plaintiff is unable to satisfy the injury requirement for Article III standing. Accordingly,

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[15] Thus, plaintiff's statements that he "earnestly desire[s] to reinstate [his] long term business relationship with Pacific Bell" and that he "stand[s] ready, willing and able to provide" services to Pacific Bell in the future are irrelevant. (Bras Decl. ¶ 12.)

IT IS HEREBY ORDERED that:

1. The CPUC defendants' motion for summary judgment is GRANTED.

2. Plaintiff's motion for summary judgment is DENIED.

3. This action is dismissed with prejudice.

Dated: March 17, 1993.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

FILED
AUG 15 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,
Plaintiff-Appellant,
v.
CALIFORNIA PUBLIC UTILITIES COMMISSION,
Defendant-Appellee.

No. 93-15764
D.C. No. CV-92-00304-WHO
ORDER DENYING REHEARING

Before: Wallace, Chief Judge, Pregerson and Beezer, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Pregerson would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

ORIGINAL FILED
OCT 19 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RECEIVED
OCT 18 1995
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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Attorneys for Defendant
PACIFIC BELL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,

Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

CASE NO.
C 92 0304 WHO

STIPULATION AND WAIVER BY PACIFIC BELL REGARDING CONFIDENTIALITY OF EXHIBITS

RECEIVED
OCT 31 1995
LEGAL DIVISION

Pursuant to protective order in the underlying action, Pacific Bell designated the attached document as "Restricted Confidential." That document is entitled "Supplier Pre-Qualification and Selection Weighting Criteria" and was, along with its attachments, identified as Exhibit 13 to the deposition of Jack Behserasht, taken in the above action.

Pacific Bell hereby agrees to and does waive the confidential nature of the attached exhibit; Pacific Bell retracts its designation of the exhibit as "Restricted Confidential."

DATED: October 18, 1995

PACIFIC BELL LEGAL DEPARTMENT

By: /s/ Eric V. Berg
Eric V. Berg
Attorney for Defendant
PACIFIC BELL

IT IS SO ORDERED

WILLIAM H. ORRICK
U.S. DISTRICT JUDGE

Strip & Waiver of PB Re: Confidentiality of Exhibits
Case No. C 92 0304 WHO
0121512.01

Exhibit 13

Supplier Pre-Qualification and Weighting Criteria

Bay Area Architecture

Attributes	Selection Weighting Criteria
Number of Licensed Architects in Firm	5
Number of Years in Business	5
Financial Data Submitted	—
90 Expenditures and Under Contract	5
Central Office Design Experience	25
Administrative Space Design Exp.	10
Present C.A.D. Capability	5
Will Participate in New Technologies	—
Able to Serve Entire Bay Area	—
M/WBE Status	10
Will Share Internal Costs/Processes	—
Quality of Past Performance	25
Size of Organization	5
Total	95

BTS 4/16/91
criteria

RESTRICTED CONFIDENTIAL

PROOF OF SERVICE BY MAIL

Re: *J. Jack Bras v. Pacific Bell, et al.*
United States District Court, Northern District Court
Action No. Civil No. C 92 0304 WHO

I, Dolores M. Frye, declare that:

I am over the age of eighteen years, not a party to the within action, and employed in the City and County of San Francisco, California. My business address is Pacific Bell Legal Department, 140 New Montgomery Street, Room 1015, San Francisco, California 94105.

I am readily familiar with our practice for collection and processing of correspondence and documents for mailing. Under that practice, in the ordinary course of business, correspondence and documents are deposited, postage fully prepaid, with the United States Postal Service on the same day they are collected and processed.

On the date specified below, I served the foregoing **STIPULATION AND WAIVER (SIGNED INTO ORDER) BY PACIFIC BELL REGARDING CONFIDENTIALITY OF EXHIBITS** on the person(s) listed below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, in accordance with our ordinary practices, addressed as follows:

Pamela A. Lewis, Esq.
Morgan, Miller & Blair
1676 North California Blvd., Ste. 200
Walnut Creek, CA 94596

Arocles Aguilar, Esq.
California Public Utilities Commission
505 Van Ness Avenue, Room 5124
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: October 30, 1995

Dolores M. Frye

Stip & Waiver of PB Re:
Confidentiality of Exhibits
Case No. C 92 0304 WHO
0122397.01

LAW OFFICES OF JOHN H. GARVIN
7901 Stoneridge Drive, Suite 501
Pleasanton, CA 94588

Telephone: (415) 847-3033

Attorney for Plaintiff
J. JACK BRAS, individually
and doing business as
J. JACK BRAS & ASSOCIATES

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,
Plaintiff,

v.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,
Defendants.

CIVIL NO. C 92 0304

COMPLAINT FOR MONEY DAMAGES DECLARATORY RELIEF, INJUNCTIVE RELIEF AND ATTORNEY'S FEES UNDER THE UNITED STATES CONSTITUTION; CALIFORNIA CONSTITUTION; 42 U.S.C. SECTIONS 1981, 1983 AND 1985

Jury Trial Demanded

I

PRELIMINARY STATEMENT

Plaintiff J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES (hereinafter "BRAS") seeks to have this court declare invalid and enjoin the enforcement of California Public Utilities Code Sections 8281 et seq. commonly known as the "Women, Minority Business Enterprise Program" for public utilities (hereinafter "WMBE"), as well as General Order 156 promulgated and enforced by the California Public Utilities Commission (hereinafter "CPUC") to implement the WMBE program. This body of law is challenged on the grounds that it is in conflict with the provisions contained in the 14th Amendment of the Constitution of the United States as well as Article 1, Section 7 and 8 of the Constitution of the State of California. Plaintiff claims that as a white, male architect he has been the subject of invidious, unlawful discrimination on account of his race and sex because of the implementation and enforcement of the aforesaid WMBE program by defendants.

II

JURISDICTION

1. Jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1343(3) and (4). This is an action authorized by 42 U.S.C. Sections 1983 and 1985. The rights, privileges and immunities sought to be secured in this action are rights, privileges and immunities guaranteed by the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States and by 42 U.S.C. Section 1981.

2. This action is also brought pursuant to the Constitution of the State of California Article 1, Section 7 and Section 8 and any legislation effecting such mandates.

3. This action is also brought pursuant to California Code of Civil Procedure Section 1021.5 and 42 U.S.C. Section 1988 for attorneys' fees.

4. The unlawful discriminatory practices alleged below have been and are now continuing to be committed within the Northern Complaint District of California.

5. This action also seeks declaratory judgment of this court pursuant to F.R.C.P. 57, to declare California's WMBE Program unconstitutional under the 14th Amendment to the United States Constitution and under Article 1, Section 7 and 8 of the California Constitution as promulgated and implemented to deprive plaintiff of said constitutional rights. The declaratory judgment, as well as the injunctive relief sought herein, are necessary to protect the rights of plaintiff but also the rights of existing white, male vendors or contractors in their business dealings with public utilities such as defendant PACIFIC BELL.

III

PARTIES

6. At all times herein material plaintiff BRAS has been and continues to be a licensed California architect presently residing in the City of Pleasanton, Alameda County, State of California and doing business as J. Jack Bras & Associates, a sole proprietorship engaged in the rendition of architectural services in the greater San Francisco Bay Area.

7. At all times herein material defendant PACIFIC BELL has been and continues to be a corporation authorized to do and doing business in the State of California with its principal offices located in the City and County of San Francisco and, at all times herein material provides telephone and telephone related services and products as a regulated public utility under the CPUC and laws applicable thereto.

8. At all times herein material defendants NEAL SHULMAN and PHILIP BREMOND, each sued herein in their representative capacity, are respectively the executive director of the CPUC and WMBE Program Manager for the CPUC charged with the implementation and enforcement of the WMBE law as set forth in California Public Utilities Code Sections 8281 et seq. as well as CPUC General Order 156.

FIRST CAUSE OF ACTION
(VIOLATION OF 42 U.S.C.S. Section 1981 and 14th Amendment to U.S. Constitution)

Plaintiff alleges as follows:

9. Effective January 1, 1987 California enacted, as set forth in its Public Utilities Code Sections 8281 et seq., a body of law entitled "Women and Minority Business Enterprises (later amended to include disabled veterans) which found, inter alia, that women, and minority business enterprises (WMBEs) have traditionally received less than a proportionate share of regulated public utility procurement contracts (Section 8281(b)(1)(C)) and provided that the California Public Utilities Commission (CPUC) shall require each public utility under its jurisdiction with gross annual revenues exceeding twenty-five million dollars ($25,000,000) to establish short and long term goals and time tables to hire WMBEs in the procurement of goods and services purchased by such public utilities and, further, to submit annually a detailed and verifiable plan for increasing WMBEs procurement in all categories. (Section 8281(a) and (b).) Annual reports from such public utilities to the CPUC concerning the implementation of such programs were required and the CPUC was itself to submit an annual report to the legislature as to the progress of activities undertaken by each such public utility. (Section 8283(b) and (e).) Although "quotas" were not to be implemented (Section 8283(b)), the legislature recognized "goals" of

30% or more being utilized by public agencies in their award of contracts to such business enterprises as a benchmark to be achieved (Section 8281(b)(1)(B)). Noteworthy in this body of law is the absence of any finding that discriminatory business practices against women and minority contractors existed in the procurement of goods and services by the public utilities from the business community at large.

10. Pursuant to California Public Utilities Code Section 8283(c), the CPUC promulgated and implemented General Order 156 effective May 30, 1988 which, inter alia, directed such public utilities to set short (one year) mid term (three years) and long term (five years) "goals" for using WMBE contractors for each major product and service category, establishing an initial minimum long term goal for each major category of product and services of "not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises." (Emphasis added.) (Section 6.2, General Order 156.) The term "goal" is defined to mean "a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota." (Section 1.3.12, General Order 156.) Additionally, CPUC's General Order 156 required each utility to train its WMBE personnel in a manner such that their performance evaluation would depend upon his/her progress in meeting the aforesaid "goals." (Section 1.1.2, General Order 156.) Further, General Order 156 required each such utility to promulgate and implement an external outreach program designed to disseminate to prospective WMBE contractors the benefits of this program and to work with such groups in order to qualify them for participation in the WMBE program. (Section 4.2, General Order 156.)

11. Further, General Order 156 directed the affected public utilities to establish 39 categories each consisting of a major product and service group as to which its goals were required to be expressed as a percentage of total dollars awarded by a utility to outside vendors in that category

(Section 6.7, General Order 156), such goals to be "substantial and verifiable." (Section 6, General Order 156.) "Substantial goals" was defined to "mean goals which are realistic and clearly demonstrate a utilities commitment to increase WMBEs' share of the utilities purchases and contracts." (Footnote 6, General Order 156.) One of the factors that each effected utility was required to consider in setting their goals was any "other appropriate factors which would increase the WMBEs' share of utility business." (Section 6.1.4., General Order 156.) The CPUC admonished the affected utilities that the "specification of initial long term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the legislature found in Public Utilities Code Section 8281(b)(1)(B) are awarding 30% or more of their contracts to WMBEs'." (Section 6.2, General Order 156.)

12. Defendant Pacific Bell, as an affected public utility forthwith implemented General Order 156 and, as required, submitted its annual report to the CPUC setting forth Pacific Bell's activities and results for the period January 1-December 31, 1990. Said defendant reported to the CPUC that for the year 1990 it had exceeded its 1990 goal of 14.5% (9.9% MBE's and 5% WBE's) with an actual performance of 16.3% (MBE's 9.1% and WBE's 7.2%) (page 24 of defendant PACIFIC BELL's M/WBE annual report). However, in the broad category of "architect/interior design" the 1990 MBE goal was 35.5% and WBE goal was 7.5% with actual performance achieved in 1990 indicating 31.8% MBE and 23.7% WBE (page 25 (a), PACIFIC BELL's M/WBE annual report to the CPUC). In total, for the year 1990 in the architect/interior design group PACIFIC BELL awarded, in dollar terms, 55.5% of its contracts to women/minority business enterprises. For the year 1991, defendant PACIFIC BELL in this category of architect/interior design, set its goal for both MBE's and WBE's for a total of 55.5%, for 1993 55.5% and for 1995

55.5% (page 34(a) of defendant PACIFIC BELL's M/WBE annual report).

13. Since 1969 and continuing through 1990 plaintiff BRAS has continuously provided architectural services to defendant PACIFIC BELL. On information and belief plaintiff BRAS alleges that his architectural services have always been competitive and at least satisfactory to defendant PACIFIC BELL.

14. Plaintiff BRAS is himself white and a male and, being a small architectural firm, employs one other licensed architect who is also white and male. In short, plaintiff BRAS has never claimed to be an actual or prospective WMBE entity.

15. Commencing sometime in 1991 plaintiff BRAS sustained a severe diminution of his business with defendant PACIFIC BELL. On information and belief plaintiff BRAS alleges that his loss of a substantial portion of his architectural services to PACIFIC BELL was because PACIFIC BELL deliberately and intentionally ceased doing all but a mere trickle of business with plaintiff BRAS in order to meet the mandate of the WMBE program promulgated by the legislature in Public Utilities Code Section 8281 et seq. and CPUC's General Order 156. In substance plaintiff Bras alleges that defendant PACIFIC BELL, under color of law, has discriminated against plaintiff BRAS on the grounds of his race and gender and in violation of his rights under the 14th Amendment to the United States Constitution.

16. As a proximate result of said discrimination by defendant PACIFIC BELL, plaintiff BRAS has suffered compensatory and general damages in an amount to be determined at trial in accordance with proof.

SECOND CAUSE OF ACTION
(42 U.S.C. SECTIONS 1981 and 1983)

17. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out here again.

18. The action taken by defendant PACIFIC BELL as set forth above were taken under color of law and are in violation of plaintiff's rights as secured by 42 U.S.C. Sections 1981 and 1983.

THIRD CAUSE OF ACTION
(42 U.S.C. SECTION 1985)

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

20. On information and belief plaintiff alleges that defendant PACIFIC BELL conspired, in conjunction with defendants NEAL SHULMAN and PHILIP BREMOND, in their representative capacity with the CPUC, to deprive plaintiff of the equal privileges and immunities guaranteed under the 14th Amendment to the United States Constitution by implementing the WMBE law, including General Order 156, in a manner which substantially deprived plaintiff from continuing his long term business relationship with defendant PACIFIC BELL and resulting in a substantial loss of income arising out of the furtherance of said conspiracy.

FOURTH CAUSE OF ACTION
(California Constitution Article 1, Section 7)

21. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

22. The actions taken by defendant PACIFIC BELL as set forth above unlawfully denied plaintiff the equal protec-

tion of the laws in violation of plaintiff's rights under Article 1, Section 7 of the California State Constitution.

FIFTH CAUSE OF ACTION
(California Constitution, Article 1, Section 8)

23. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

24. The actions taken by the defendant PACIFIC BELL as set forth above unlawfully deprived plaintiff from pursuing his profession because of his sex and race. By doing so defendant PACIFIC BELL violated plaintiff's rights under Article 1, Section 8 of the California State Constitution.

SIXTH CAUSE OF ACTION
(F.R.C.P. 57-DECLARATORY RELIEF)

25. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-15 inclusive with the same force and effect as if set out herein again.

26. Plaintiff seeks a declaratory judgment on the grounds that the WMBE law as set forth in California Public Utilities Code Section 8281 et seq. as well as CPUC's General Order 156, as promulgated and as applied against plaintiff denies plaintiff, as well as others similarly situated, the equal protection of the law as well as the privileges and immunities guaranteed to plaintiff and others similarly situated under the 14th Amendment to the United States Constitution as well as Article 1, Section 7 and Section 8 of the California Constitution. Plaintiff has no plain, speedy or adequate remedy at law to rectify the unlawful racial and sexual discrimination practice upon him as well as others similarly situated by defendants other than by way of declaratory relief prayed for in this complaint.

SEVENTH CAUSE OF ACTION
(Injunctive Relief)

27. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-15 inclusive with the same force and effect as if set out here again.

28. Plaintiff respectfully requests the court to issue a preliminary injunction as well as a permanent injunction enjoining all defendants, their agents, servants and employees and any and all persons acting in concert with them from implementing the WMBE law, including General Order 156, in a manner which constitutes any race or sex discrimination against plaintiff and other white males similarly situated. Plaintiff alleges that it has no plain, speedy or adequate remedy at law to rectify a continuation of the unlawful racial and sexual discrimination practiced upon him and others similarly situated by defendants other than by the injunctive relief prayed for in this complaint.

EIGHTH CAUSE OF ACTION
(Punitive Damages)

29. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-16 inclusive with the same force and effect as if set out herein again.

30. On information and belief plaintiff alleges that the actions taken by defendant PACIFIC BELL as set forth above were intentional, deliberate and applied against plaintiff with a reckless or malicious disregard of his constitutional rights as guaranteed to him under the 14th Amendment to the United States Constitution as well as 42 U.S.C.S. Sections 1981, 1983 and 1985 and, by way of example, plaintiff requests that exemplary or punitive damages be assessed defendant PACIFIC BELL in the amount of $10,000,000.

NINTH CAUSE OF ACTION
(Attorney's Fees)

31. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1-28 inclusive with the same force and effect as if set out herein again.

32. Plaintiff has had to incur the services of attorneys in order to protect his constitutional rights under the federal and state constitutions as well as under U.S.C.S. Sections 1981, 1983 and 1985 as described above.

33. Plaintiff is entitled to attorney's fees from defendant PACIFIC BELL for vindicating plaintiff's rights as well as the rights of others similarly situated pursuant to 42 U.S.C. Section 1988 and the California Code of Civil Procedure Section 1021.5. Further, plaintiff would also be entitled to attorney's fees from any party, necessary or otherwise, that opposes in this litigation the relief plaintiff seeks.

WHEREFORE, plaintiff respectfully prays that this court enter judgment in favor of plaintiff on each and every cause of action and grant plaintiff:

1. Money damages, both compensatory and general, from defendant PACIFIC BELL for its violation of plaintiff's constitutional rights as guaranteed by the United States Constitution, the California State Constitution, 42 U.S.C. Sections 1981, 1983 and 1985 in an amount to be determined in accordance with proof at time of trial;

2. Exemplary or punitive damages in the amount of $10,000,000 assessed against defendant PACIFIC BELL by way of example for violation of plaintiff's constitutional rights secured by the United States Constitution, the California State Constitution, 42 U.S.C. Sections 1981, 1983 and 1985;

3. A declaratory judgment that defendants' actions, as well as the WMBE law (California Public Utility Code Section 8281-8286, inclusive) and General Order 156

promulgated by the California Public Utilities Commission violate the rights of plaintiff as secured to him by the United States Constitution, the California State Constitution, 42 U.S.C. Section 1981 and 1983;

4. A preliminary injunction and permanent injunction joining all defendants, their agents, servants, employees and any and all persons acting in concert with them from utilizing or implementing any race or gender goals, guidelines or quotas in its application and enforcement of California Public Utilities Code Sections 8281-8286 inclusive and General Order 156;

5. Attorneys' fees and costs of suit herein from defendant PACIFIC BELL and any necessary party that opposes the relief sought; and,

6. Such other and further relief as to the court may be just.

DATED: January 8, 1992.

LAW OFFICES OF
JOHN H. GARVIN

BY: /s/ JOHN H. GARVIN
JOHN H. GARVIN
Attorney for Plaintiff
J. JACK BRAS, individually
and doing business as
J. JACK BRAS &
ASSOCIATES

VERIFICATION

I am a plaintiff in the above entitled action. I have read the foregoing COMPLAINT FOR MONEY DAMAGES, DECLARATORY RELIEF, INJUNCTIVE RELIEF AND ATTORNEY'S FEES UNDER THE UNITED STATES CONSTITUTION; CALIFORNIA CONSTITUTION; 42 U.S.C. SECTIONS 1981 AND 1983; and know the contents thereof; the same is true of my own knowledge, except as to those matters stated therein upon my information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct, and that this verification is executed on January 8, 1992 at Pleasanton, California.

/s/ J. JACK BRAS

J. JACK BRAS

Article 5

WOMEN AND MINORITY BUSINESS ENTERPRISES

Section

8281. Legislative findings and declarations; state policy; purpose of article.

8282. Definitions.

8283. Electrical, gas and telephone corporations with revenues over $25,000,000; annual submission of plan for increasing women, minority business and disabled veteran business enterprise procurement.

8284. Criteria for determining and verifying eligibility of women, minority business and disabled veteran business enterprises for procurement contracts; outreach programs.

8285. False representation of businesses; penalty.

8286. Contract procurement measures; considerations for businesses.

Article 5 was added by Stats.1986, c. 1259, § 1.

United States Code Annotated

Contracts, equal opportunity, see 12 U.S.C.A. § 4520.

§ 8281. Legislative findings and declarations; state policy; purpose of article

(a) The Legislature hereby finds and declares that the essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of that competition is basic to the economic well-being of this state and that well-being cannot be realized unless the actual and potential capacity of women, minority, and disabled veteran business enterprises is encouraged and developed. Therefore, it is the declared policy of the state to aid the interests of women, minority, and disabled veteran business enterprises in order to preserve reasonable and just prices and a free competitive

enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for commodities, supplies, technology, property, and services for regulated utilities are awarded to women, minority, and disabled veteran business enterprises, and to maintain and strengthen the overall economy of the state.

(b)(1) The Legislature finds all of the following:

(A) The opportunity for full participation in our free enterprise system by women, minority, and disabled veteran business enterprises is essential if this state is to attain social and economic equality for those businesses and improve the functioning of the state economy.

(B) Public agencies which have established short- and long-range women, minority, and disabled veteran business enterprise goals are awarding 30 percent or more of their contracts to these business enterprises.

(C) Women, minority, and disabled veteran business enterprises have traditionally received less than a proportionate share of regulated public utility procurement contracts.

(D) It is in the state's interest to expeditiously improve the economically disadvantaged position of women, minority, and disabled veteran business enterprises.

(E) The position of these businesses can be improved by providing long-range substantial goals for procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work from women, minority, and disabled veteran businesses.

(F) That procurement also benefits the public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby encouraging competition among the suppliers and promoting economic efficiency in the process.

(2) It is the purpose of this article to do all of the following:

(A) Encourage greater economic opportunity for women, minority, and disabled veteran business enterprises.

(B) Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electrical, gas, and telephone corporation contracts and contracts of their commission-regulated subsidiaries and affiliates.

(C) Clarify and expand the program for the procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work from women, minority, and disabled veteran business enterprises.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 4.)

§ 8282. Definitions

For the purposes of this article, the following definitions apply:

(a) "Women business enterprise" means a business enterprise that is at least 51 percent owned by a woman or women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of those individuals.

(b) "Minority business enterprise" means a business enterprise that is at least 51 percent owned by a minority group or groups; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more minority groups, and whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans.

(c) "Disabled veteran business enterprise" has the same meaning as defined in subdivision (g) of Section 999 of the Military and Veterans Code.

(d) "Control" means exercising the power to make policy decisions.

(e) "Operate" means being actively involved in the day-to-day management and not merely officers or directors.

(Added by Stats.1986, c. 1259 § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 5.)

§ 8283. Electrical, gas and telephone corporations with revenues over $25,000,000; annual submission of plan for increasing women, minority business and disabled veteran business enterprise procurement.

(a) The commission shall require each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates, to submit annually, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories.

(b) These annual plans shall include short- and long-term goals and timetables, but not quotas, and shall include methods for encouraging both prime contractors and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts in all categories which provide subcontracting opportunities.

(c) The commission shall establish guidelines for all electrical, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to this article.

(d) Every electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars

($25,000,000) shall furnish an annual report to the commission regarding the implementation of programs established pursuant to this article in a form that the commission shall require, and at the time that the commission shall annually designate.

(e) The commission shall provide a report to the Legislature on September 1 of each year, on the progress of activities undertaken by each electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) pursuant to this article in the implementation of women, minority, and disabled veterans business enterprise development programs. The commission shall recommend a program for carrying out the policy declared in this article, together with recommendations for legislation that it deems necessary or desirable to further that policy.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1989, c. 76, § 1, eff. June 30, 1989; Stats.1990, c. 394 (A.B.2935), § 1; Stats.1990, c. 516 (S.B.2398), §6.)

Historical and Statutory Notes

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

Cross References

Reports to legislature or governor, moratorium and exceptions, see Government Code § 7550.5.

§ 8284. Criteria for determining and verifying eligibility of women, minority business and disabled veteran business enterprises for procurement contracts; outreach programs

(a) The commission shall, by rule or order, adopt criteria for verifying and determining the eligibility of women,

minority, and disabled veteran business enterprises for procurement contracts.

(b) The commission shall develop, and require every electrical, gas, and telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their commission-regulated subsidiaries and affiliates to implement, an outreach program to inform and recruit women, minority, and disabled veteran business enterprises to apply for procurement contracts under this article.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 7.)

§ 8285. False representation of businesses; penalty

Any person or corporation, through its directors, officers, or agents, which falsely represents a business as a women, minority, or disabled veteran business enterprise in the procurement of, or attempt to procure, contracts from an electrical, gas, or telephone corporation with gross annual revenues exceeding twenty-five million dollars ($25,000,000), or a commission-regulated subsidiary or affiliate subject to this article, shall be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment in the county jail for not to exceed one year or in the state prison for not to exceed five years, or by both that fine and imprisonment. In the case of a corporation, the fine or imprisonment, or both, shall be imposed on every director, officer, or agent responsible for the false statements.

(Added by Stats.1986, c. 1259, § 1. Amended by Stats.1990, c. 516 (S.B.2398), § 8.)

Historical and Statutory Notes

The 1990 amendment included business enterprises of disabled veterans; substituted "or a" for "and their" before "commission-regulated"; deleted "of its directors, officers,

or agents responsible for the false statements" after "not to exceed five years"; added the second sentence; and made other nonsubstantive changes.

§ 8286. Contract procurement measures; considerations for businesses

In order to facilitate the participation of women-owned businesses, minority-owned businesses, and small businesses in contract procurement, any corporation subject to this article may consider the following measures to include those businesses in all phases of their contracting:

(a) Timely or progressive payments to those businesses.

(b) An amendment of the performance bond requirements when past performance within a specified area of business justifies that consideration.

(c) The provision of assistance to those businesses by securing contract payments to those businesses with letters of credit, negotiable securities, or other financing arrangements or measures.

(Added by Stats.1990, c. 1195 (A.B.3985). § 2.)

GENERAL ORDER 156

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

RULES GOVERNING THE DEVELOPMENT OF PROGRAMS TO INCREASE PARTICIPATION OF WOMEN, MINORITY AND DISABLED VETERAN BUSINESS ENTERPRISES IN PROCUREMENT OF CONTRACTS FROM UTILITIES AS REQUIRED BY PUBLIC UTILITIES CODE SECTIONS 8281-8286

Adopted April 27, 1988. Effective May 30, 1988.
Decision 88-04-057 in R.87-02-026,
Modified by Decisions 88-09-024, 89-08-041, 90-11-053, 90-12-027 and 92-06-030.

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1. GENERAL

1.1. **Intent**

1.1.1. **Purpose** — These rules implement PU Code Sections 8281-8286 which require the Commission to establish a procedure for gas, electric, and telephone utilities with gross annual revenues exceeding $25,000,000 and their Commission-regulated subsidiaries and affiliates to submit annual detailed and verifiable plans for increasing women, minority, and disabled veteran business enterprises' (WMDVBE) procurement in all categories.

1.1.2. **Revisions of Scope**—These rules may be revised on the basis of experience gained in their application and/or changes in legislation. Utilities and other interested parties may individually or collectively file an application with the Commission for the purpose of amending these rules. Any such application shall clearly set forth the changes proposed and the supporting rationale.

1.1.3. In cases where the application of any of these rules results in undue hardship or unreasonable expense to a utility, the utility may request relief by filing an application in accordance with the Commission's Rules of Practice and Procedure. Where the relief requested is of minor importance or temporary in nature, the utility may apply for such relief through an advice letter filing. Any advice letter filing must, at a minimum, be served on all parties on the service list of this proceeding.

1.2. **Applicability**—These rules are applicable to all gas, electric, and telephone utilities under the Commission's jurisdiction with gross annual revenues exceeding $25,000,000 and their Commission-regulated subsidiaries and affiliates.

1.3. **Definitions**

1.3.1. "Commission" means The California Public Utilities Commission as provided for in Article XII of the California Constitution.

1.3.2. "Women-owned business" means (1) a business enterprise (a) that is at least 51% owned by a woman or women or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more women; and (2) whose management and daily business operations are controlled by one or more of those individuals.

1.3.3. "Minority-owned business" means (1) a business enterprise (a) that is at least 51% owned by a minority individual or group(s) or (b) if a publicly owned business, at least 51% of the stock of which is owned by one or more minority groups, and (2) whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes, but is not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other groups, as defined herein.

1.3.4. "WMBE" means a women owned or minority owned business enterprise; under these rules, the women and/or minorities owning such an enterprise must be either U.S. citizens or legal aliens with permanent residence status in the United States.

1.3.5. Black Americans—persons having origins in any black racial groups of Africa.

1.3.6. Hispanic Americans—all persons of Mexican, Puerto Rican, Cuban, South or Central American, Caribbean, and other Spanish culture or origin.

1.3.7. Native Americans—persons having origin in any of the original peoples of North America or the Hawaiian Islands, in particular, American Indians, Eskimos, Aleutes, and Native Hawaiians.

1.3.8. Asian Pacific Americans—persons having origins in Asia or the Indian subcontinent, including, but not limited to, persons from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan, India, Pakistan, and Bangladesh.

1.3.9. Other groups—whose members are found to be disadvantaged by the Small Business Administration pursuant to Section 8(d) of Small Business Act as amended (15 U.S.C. 637(d)), or the Secretary of Commerce pursuant to Section 5 of Executive Order 11625.

1.3.10. Disabled Veteran—a veteran of the military, naval or air service of the United States with a service-connected disability who is a resident of the State of California.

1.3.11. "Control" means exercising the power to make policy decisions.

1.3.12. "Operate" means being actively involved in the day-to-day management and not merely acting as officers or directors.

1.3.13. "Goal" means a target which when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota.

1.3.14. "Excluded category" means a category of products or services which may be removed from the dollar base used to establish goals, pursuant to Section 8.5 of this general order, because of the established unavailability of WMDVBEs capable of supplying those products or services.

1.3.15. "Short-term goal" means a goal applicable to a period of (1) one year.

1.3.16. "Mid-term goal" means a goal applicable to a period of (3) three years.

1.3.17. "Long-term goal" means a goal applicable to a period of (5) five years.

1.3.18. "Utility" means all electric, gas, and telephone corporations with gross annual revenues exceeding twenty-five million dollars ($25,000,000) and their Commission-regulated subsidiaries and affiliates.

1.3.19. "Clearinghouse" means a Commission-supervised program that shall conduct WMBE verifications and maintain a database of WMDVBEs for the use of utilities and the Commission.

1.3.20. "Subcontract" means any agreement or arrangement between a contractor and any party or person (in which the parties do not stand in the relationship of an employer and an employee):

1.3.20.1. For the furnishing of supplies or services for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

1.3.20.2. Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

2. VERIFICATION

The following rules and guidelines shall be used to verify the eligibility of women and minority business enterprises (WMBEs) for participation in utility WMDVBE procurement programs.

2.1. The clearinghouse described in Section 3 of this General Order shall supply a verification form to applicants. An applicant may complete the verification forms and return them to the clearinghouse for processing and inclusion in the database.

2.2. In assessing the suitability of a WMDVBE to bid for procurement contracts, a utility may require additional information or the completion of additional forms to comply with specific requirements created by the unique character of its business, such as insurance requirements, product and service codes, bonding limits, and so on. A utility may not, however, require such additional information in order to verify that a business is in fact a WMDVBE.

2.3. WMBEs shall be required to submit verification forms at least once every three years.

2.4. Completion of the verification application only initiates a verification of the business's WMBE status. Filing of an application does not guarantee verification.

2.5. The fact that a verified WMDVBE is included in the clearinghouse database shall neither be construed as an endorsement of its ability to perform nor shall such inclusion guarantee it business with the utilities.

2.6. WMBE verification forms shall be available for inspection by the Commission.

2.7. Falsification of information on the verification form is subject to the penalties provided by Public Utilities Code Section 8285.

3. CLEARINGHOUSE

The Commission shall maintain a clearinghouse for the sharing of WMDVBE identification and verification information.

3.1. The primary purpose of the clearinghouse shall be to audit and verify the status of WMBEs, and to establish and maintain a database of WMDVBEs that is accessible to the Commission and to participating utilities.

3.2. The clearinghouse auditing and verification program shall preclude the need for an individual utility to audit and verify the status of the WMBEs it does business with.

3.3. The clearinghouse shall distribute renewal verification forms to WMBEs at least once every three years. If the renewal is not completed and returned within a reasonable time, the clearinghouse shall notify the WMBE and utilities that the WMBE will not be listed as a verified WMBE in the shared database until the renewal is completed.

4. DISABLED VETERANS

The following rules and guidelines shall apply to service disabled veteran business enterprises (DVBE). "Disabled veteran" is defined in Section 1.3.10 of this General Order.

4.1. "Disabled veteran business enterprise" means a business concern certified by the administering agency as meeting all of the following requirements.

4.1.1. It is a sole proprietorship at least 51 percent owned by one or more disabled veterans or, in the case of a publicly owned business, at least 51 percent of its stock is owned by one or more disabled veterans; a subsidiary which is wholly owned by a parent corporation, but only if at least 51 percent of the voting stock of the parent corporation is owned by one or more disabled veterans; or a joint venture in which at least 51 percent of the joint venture's management and control and earnings are held by one or more disabled veterans.

4.1.2. The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business concern.

4.1.3. It is a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

4.2. "Administering Agency" means the California State Office of Small and Minority Business.

4.3. In order to qualify as a DVBE, businesses must meet the criteria in Section 4.1 and must present a current certificate from the California State Office of Small and Minority Business verifying that such criteria has been met.

5. GENERAL ORDER 156 ADVISORY BOARD

The Commission WMDVBE Staff shall consult with a General Order 156 Advisory Board (Board) to seek advice on matters relating to this General Order and to the Public Utilities Code sections applicable to this General Order.

5.1. The Board shall consist of a representative of each of the attending utilities and Black Americans (§ 1.3.5), Hispanic Americans (§ 1.3.6), Native Americans (§ 1.3.7), Asian Pacific Americans (§ 1.3.8), Women, and Disabled Veterans (§ 1.3.10).

5.2. Each non-utility group identified in Section 5.1 shall select its own representative. If a group is unable to select its representative, it may petition the Executive Director to select a representative. Representatives shall serve for two-year terms. Representatives may serve multiple terms if reselected by the group they represent.

5.3. Participation on the Board is voluntary and the utilities are free to attend, or not, and may coordinate attendance or join with other utilities of similar size or interests.

5.4. The Board shall meet no less than every other month.

6. UTILITY IMPLEMENTATION

Each utility's WMDVBE program shall be designed to ensure that a fair proportion of product and services contracts are awarded to WMDVBEs. The following minimum program elements shall be incorporated into each utility's WMDVBE program.

6.1. **Internal Utility Program Development**

Each utility shall maintain an appropriately sized staff to provide overall WMDVBE program direction and guidance and to implement WMDVBE program requirements.

6.1.1. Each utility shall ensure that its employees with procurement responsibilities receive training in the implementation of its WMDVBE program. These employees shall be evaluated on the basis of their progress in meeting the goals of their specific area of procurement. Some of the major components of a training program shall include:

(1) Review of WMDVBE program progress and results, and the development of future strategies, at officer level meetings. These meetings shall also include an exchange of ideas and a pledge of ongoing support for the program;

(2) Meetings or seminars to familiarize employees with WMDVBE program objectives, goals, and operations, and with the special problems confronting WMDVBEs;

(3) Programs to train and encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMDVBEs.

6.2. **External Outreach**

Each utility shall implement an outreach program to inform and recruit WMDVBEs to apply for procurement contracts.

6.2.1. Outreach activities may vary for each utility depending on its size, service territory, and specific lines of business. However, each utility shall at a minimum:

(1) Actively seek out opportunities to identify WMDVBE contractors and to expand WMDVBE source pools;

(2) Actively support the efforts of organizations experienced in the field who promote the interests of WMDVBE contractors;

(3) Work with WMDVBE contractors to facilitate contracting relationships by explaining utility qualification requirements, bid and contracting procedures, materials requirements, invoicing and payment schedules, and other procurement practices and procedures;

(4) At the request of any unsuccessful WMDVBE bidder, provide information concerning the relative range/ranking of the WMDVBE contractor's bid as contrasted with the successful bid. Information on additional selection criteria, such as warranty periods, maintenance costs, and delivery capability, shall be provided when requested if disclosure would not violate the proprietary nature of the specific contract element;

(5) To the extent possible, make available to WMDVBE contractors lists of utility purchase/contract categories which offer them the best opportunity for success;

(6) Encourage employees involved in procurement activities to break apart purchases and contracts as appropriate to accommodate the capabilities of WMDVBEs;

(7) Summarize this general order in its outreach program handouts. Such summaries shall state that WMDVBEs will be furnished a complete copy of this general order upon request.

6.3. **Subcontracting Program**

Each utility shall establish and maintain a subcontracting program for the purpose of encouraging its prime contractors to utilize WMDVBE subcontractors.

6.3.1. The subcontracting program shall serve as an enhancement to, and not has a replacement for, the utility's WMDVBE prime contractor outreach program.

6.3.2. The subcontracting program shall apply to the following:

(1) Purchases/contracts exceeding $500,000 for products and services;

(2) Construction contracts exceeding $1,000,000;

(3) Purchases/contracts which offer WMDVBE subcontracting opportunities, regardless of value, where appropriate.

6.3.3. The subcontracting program need not be applied to the procurement of products manufactured for general consumption, such as paper, pens, and the like, or to the procurement of products and services in excluded categories.

6.3.4. Each utility shall encourage and assist its prime contractors to develop plans to increase the utilization of WMDVBEs as subcontractors. Prime contractors shall be encouraged to submit to the utility plans that include goals for the utilization of WMDVBEs as subcontractors. These plans may be incorporated into the contract between the utility and the prime contractor. The prime contractor may submit periodic reports on its compliance with the plan to the utility.

6.3.5. Each utility is encouraged to incorporate in all purchase orders, requests for bid proposals, and other appropriate procurement documents related to procurement efforts subject to the subcontracting program, a statement similar to the following:

UTILIZATION OF WOMEN, MINORITY AND DISABLED VETERAN OWNED BUSINESS ENTERPRISES

(1) It is the policy of the utility that women, minority and disabled veteran owned business enterprises shall have the maximum practicable opportunity to participate in the performance of contracts.

(2) The contractor agrees to use his or her best efforts to carry out this policy in the award of subcontracts to the fullest extent consistent with the efficient performance of this contract.

(3) The contractor agrees to inform prospective WMDVBE subcontractors of their opportunity to request from the clearinghouse a verification application form and to return the completed form to the clearinghouse for processing and inclusion in the database.

6.3.6. Each utility is encouraged to inform suppliers of products and services that subcontracting with WMDVBEs is a factor that will be considered in the bid evaluation process. A statement to that effect could be included in all appropriate procurement documents.

6.3.7. Each utility shall monitor and include in its annual report to the Commission a summary of prime contractor progress in increasing the participation of WMDVBE subcontractors.

6.3.8. Each utility shall include in its annual plan a description of future plans for encouraging both prime contractors and grantees to engage WMDVBE subcontractors in all procurement categories which provide subcontracting opportunities.

6.3.9. Each utility may include awards to verified WMDVBE subcontractors in its WMBE results.

7. COMPLAINT PROCESS

The following rules and guidelines shall be used for complaints relating to this General Order.

7.1. **Internal Utility Appeals Process**

Each utility shall provide a mechanism through which WMDVBEs or prospective WMDVBEs can present complaints to the utility's management.

7.1.1. Complaints shall first be submitted to a WMDVBE program administrator within a reasonable time after the event complained of. WMDVBEs should be encouraged to make their complaints in writing;

7.1.2. Complaints shall be reviewed and investigated by the administrator and the administrator's decision communicated to the complainant within twenty (20) working days of receipt of the complaint by the WMDVBE program administrator;

7.2. **WMDVBE Complaints to the Commission**

In the event that a WMDVBE believes that a utility WMDVBE program administrator's decision, or any other act or omission of the utility, violates any provision of law or of any order or rule of the Commission, the WMDVBE may file a complaint with the Commission pursuant to Public Utilities Code Section 1702 and Article 3 of the Commission's Rules of Practice and Procedure (Title 20, Chapter 1, of the California Code of Regulations). The Commission will not, however, entertain complaints which do not allege violations of any law, Commission rule, order, or decision, or utility tariff resulting from such Commission action, but which instead involve only general contract-related disputes between a utility and an existing or prospective WMDVBE, such as failure to win a contract award.

7.2.1. WMDVBE complaints filed with the Commission shall be handled in a timely manner in accordance with the Commission's Rules of Practice and Procedure. Pursuant to Rule 13, defendant utilities must answer such complaints within thirty (30) days. Complaints which do not allege that the matter has first been brought to the Commission WMDVBE Staff for informal resolution may, under Rule 10, be referred to the staff to attempt to resolve the matter informally. In appropriate circumstances, the expedited complaint procedure set forth in Rule 13.2 of the Commission's Rules may be utilized.

7.2.2. The Commission's Office of the Public Advisor may assist WMDVBEs in preparing to file complaints against utilities.

7.3. **Complaints Concerning WMBE Verification Decisions**

All complaints concerning a verification decision of the clearinghouse will be governed by the following procedures.

7.3.1. Business enterprises whose WMBE status has been denied by the clearinghouse, or who have been deverified by the clearinghouse, may appeal the clearinghouse's decision to the Commission after exhausting their remedies under the internal appeal process implemented by the clearinghouse, a copy of which will be provided by the clearinghouse upon request by the affected business enterprise.

7.3.2. Third parties may file complaints challenging the WMBE status of businesses whose WMBE verification is pending, or who have already been verified by the clearinghouse. Such complaints must: 1) be in writing and be addressed to the clearinghouse; 2) set forth with specificity the grounds for the challenge in ordinary and concise language; 3) include the name and address of the complainant; and 4) be served on the affected WMBE. Such complaints may include supporting documentation.

The clearinghouse will review third party complaints to determine whether there appears to be a factual basis for questioning the challenged party's WMBE status. If the clearinghouse determines that there appears to be an insufficient factual basis for the complaint, it shall inform the complainant and affected WMBE of this determination in writing within 20 business days of the receipt of the complaint. The clearinghouse shall inform the complainant of its right to appeal this determination to the Commission.

7.3.3. If the clearinghouse determines that there appears to be a sufficient factual basis for questioning the challenged party's WMBE status, it shall require the challenged party to provide the clearinghouse information sufficient to permit the evaluation of its WMBE status. Following a thorough review and evaluation of the information presented by both parties, and an opportunity for each party to respond to the clearinghouse proposed resolution of the verification challenge, the clearinghouse shall notify the parties of its final verification decision and of their right to appeal this decision to the Commission.

7.3.4. During the pendency of a third party challenge of a verified WMBE, the presumption that the challenged party is a WMBE will remain in effect.

7.3.5. If a third party complaint does not include the minimum criteria set forth above, or if the third party rescinds its complaint, the clearinghouse may review the complaint to determine whether it merits unilateral consideration by the clearinghouse.

7.4. **Commission Review of WMBE Verification Complaints** Complaints regarding clearinghouse verification decisions shall comply with Article 3 of the Commission's Rules of Practice and Procedure, except that the clearinghouse, rather than one or more utilities, shall be named as the defendant. When reviewing appeals of clearinghouse verification decisions, the Commission shall determine whether there is substantial evidence in the record, when considered as a whole, to support the conclusion reached by the clearinghouse.

8. GOALS

Each utility shall annually set substantial and verifiable short-term (one year), mid-term (three years), and long-term (five years) goals for the utilization of WMBEs. Goals shall be set annually for each major product and service category which provides opportunities for procurement. "Substantial goals" mean goals which are realistic and clearly demonstrate a utility's commitment to increase WMDVBEs' share of the utility's purchases and contracts.

8.1. The utilities shall consider the following factors in setting their goals:

8.1.1. Total utility purchasing and/or contracting projections;

8.1.2. Availability of WMDVBEs and competitiveness in the geographical area served by the utility;

8.1.3. Market dynamics based on historical data and trends;

8.1.4. Other appropriate factors which would increase the WMDVBEs' share of utility business.

8.2. Each utility shall establish initial minimum long-term goals for each major category of products and services the utility purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. For the purposes of this section, contracts with minority women owned business enterprises can be counted toward either the minority owned business enterprise goal or the women owned business enterprise goal, but not toward both. Similarly, contracts with disabled veteran business enterprises can be counted either as disabled veteran business enterprise procurement or the appropriate women or minority business enterprise goal, but not toward both.

8.3. The specification of initial long-term goals in this section shall not prevent the utilities from seeking to reach parity with public agencies, which the Legislature found in Public Utilities Code Section 8281 (b)(1)(B) are awarding 30% or more of their contracts to WMBEs.

8.4. Goals shall also be established for both minority women owned business enterprises and non-minority women owned business enterprises. These goals are to be a subset of the overall goal for WMBEs established by Section 8.2 (initially 20% for both women owned business enterprises and minority owned business enterprises). These goals are intended to ensure that utilities do not direct their WMBE procurement programs toward non-minority women and minority men owned business enterprises to the detriment or exclusion of minority women owned business enterprises.

8.4.1. Goals shall be set for each major category of products or services. Goals need not be set for products or services which fall within an "excluded category" created by a utility pursuant to Section 8.5.

8.5. A utility may create an "excluded category" of products or services where it is clearly evident that WMDVBEs do not provide a specific product or service, or that sole source procurement is the only available procurement method. The utility shall bear the burden of demonstrating the unavailability of WMDVBEs capable of supplying such products or services. Because there may in the future be WMDVBEs capable of supplying products or services in an excluded category, the utility must justify in its annual report the continued existence of any excluded category. Excluded categories must be noted in the utility's annual report to the Commission on WMDVBE program progress and future plans.

8.6. A utility which is presently purchasing products or services from affiliates may subtract the dollars paid to affiliates for these products or services from the total dollars used as the basis for establishing goals for purchases from WMDVBEs of these categories of products or services, provided that the utility encourages the affiliate to establish an appropriate subcontracting program where such affiliate employs subcontractors. Any utility which takes advantage of this section must in its annual report to the Commission state whether the affiliates have established a subcontracting program and describe the results of any such program. The utility's annual plan must describe any future plans to encourage such a subcontracting program. This section applies only to those utilities which are purchasing products or services from affiliates as of the effective date of this general order (May 30, 1988).

8.7. Goals for each specific product or service category shall be expressed as a percentage of total dollars awarded by a utility to outside vendors in that category; however, where appropriate, non-numeric goals may also be included.

8.8. Overall program goals shall be expressed as a percentage of total dollars awarded to outside vendors in all categories of products and services purchased by a utility other than products and services which fall within an excluded category established by the utility pursuant to Section 8.5, or which are included in a fuel procurement base established pursuant to Section 8.10.

8.9. Payments to other utilities and franchise tax fees, other taxes and postage need not be included in the standard procurement base used to establish goals.

8.10. Each utility may establish a separate fuel procurement base for reporting progress and establishing goals for procurement of fuels from WMDVBEs. Utilities choosing to report fuel purchases separately from the purchase of other products and services must follow the guidelines set forth below:

8.10.1. Fuel used to power vehicles, heat utility facilities, and supply emergency generators may not be included in the fuel procurement base. Such fuel must be included in the standard procurement base used to establish goals, unless the fuel is purchased from another utility and thus subject to the exclusion authorized herein;

8.10.2. The fuel procurement base must, at a minimum, include all purchases of natural gas from domestic onshore natural gas markets;

8.10.3. Utilities which purchase from WMDVBE suppliers fuels other than domestic onshore natural gas must include such purchases in the fuel procurement base because Section 8.5 does not permit utilities to exclude product and services categories for which there are available WMDVBEs;

8.10.4. Utilities may exclude purchases of fuel other than domestic onshore natural gas if such fuel qualifies for an exclusion under Section 8.5 and if the utility plans for and reports on progress in increasing the procurement of such fuels from WMDVBEs.

8.11. Each utility shall make special efforts to increase utilization and encourage entry into the marketplace of WMDVBEs in product or service categories where there has been low utilization of WMDVBEs, such as legal and financial services, fuel procurement, and areas that are considered technical in nature.

8.12. Except for any penalty imposed as a result of a Commission-initiated investigation, no penalty shall be imposed for failure of any utility to meet and/or exceed goals.

8.13. Utilities shall report their goals in their annual plans.

9. ANNUAL REPORT

Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, an Annual Report on their WMDVBE Program.

9.1. The Annual Report shall contain at least the following elements:

9.1.1. A description of WMDVBE program activities engaged in during the previous calendar year. This description shall include both internal and external activities;

9.1.2. A summary of WMDVBE purchases and/or contracts, with breakdowns by ethnicity, product and service categories compared with total utility contract dollars awarded to outside vendors in those categories;

9.1.3. An itemization of WMDVBE program expenses provided in the format required by the Cost Exhibit in D.89-08-026;

9.1.4. A description of progress in meeting or exceeding set goals and an explanation of any circumstances that may have caused the utility to fall short of its goals;

9.1.5. A summary of prime contractor utilization of WMDVBE subcontractors;

9.1.6. A list of WMDVBE complaints received during the past year, accompanied by a brief description of the nature of each complaint and its resolution or current status;

9.1.7. A summary of purchases and/or contracts for products and services in excluded categories.

9.1.8. A description of any efforts made to recruit WMDVBE suppliers of products or services in procurement categories where WMDVBE utilization has been law, such as legal and financial services, fuel procurement, and areas that are considered highly technical in nature.

9.1.9. A justification for the continued existence of any "excluded category" of products or services which has been removed from the procurement dollar base used to set goals because of the established unavailability of WMDVBE suppliers. Such justification must include a description of any efforts made to find and or recruit WMDVBE suppliers of products or services in the excluded category.

9.1.10. Each utility which elects to report fuel procurement separately must file with the Executive Director by March 1 of each year, beginning in 1991, a separate detailed and verifiable report on WMDVBE participation in fuel markets. These reports must include, at a minimum, the results of purchases in each fuel category.

a. Each utility shall report purchases by:
   1. Market origin and fuel type;
   2. Volume and dollar magnitude;
   3. Term of sale, e.g., spot, intermediate, long term;
   4. Ethnicity and gender of the supplier;

b. Each utility shall provide:
   1. An explanation of how existing and/or changing market conditions are affecting the utility's ability to meet or exceed its WMDVBE goals for fuel;
   2. A comprehensive description of the specific outreach programs used to seek WMDVBE fuel suppliers in each market in which fuel is purchased.
   3. A justification for any exclusion of a specific fuel category from the utility's fuel procurement base.

9.2. This general order is not intended to permit erosion of WMDVBE programs and reporting presently engaged in by a utility.

9.3. Nothing in this general order shall prohibit any utility from breaking down specific categories further than presently required (for example, reporting contracts awarded to Filipino Americans separately from those awarded to Asian Pacific Americans, or reporting male and female results within minority-owned classifications).

10. ANNUAL PLAN

Utilities shall serve twelve (12) copies on the Executive Director, by March 1 of each year, beginning in 1989, a detailed and verifiable plan for increasing women, minority, and disabled veteran business enterprises procurement in all categories.

10.1. The Annual Plan shall contain at least the following elements:

10.1.1. Short, mid, and long term goals set as required by Section 6 [sic, Section 8], *supra*;

10.1.2. A description of WMDVBE program activities planned for the next calendar year. This description shall include both internal and external activities.

10.1.3. Plans for recruiting WMDVBE suppliers of products or services where WMDVBE utilization has been low, such as legal and financial services, fuel procurement, and areas that are considered highly technical in nature.

10.1.4. Plans for seeking and or recruiting WMDVBE suppliers of products or services in any "excluded category" of products or services which has been removed from the procurement dollar base used to set goals because of the established unavailability of WMDVBE suppliers.

10.1.5. Plans for encouraging both prime contractors and grantees to engage WMDVBEs in subcontracts in all categories which provide subcontracting opportunities.

10.1.6. Plans for complying with the WMDVBE program guidelines established by the Commission as required by Public Utilities Section 8283(c). The Executive Director's Office will be responsible for developing, periodically refining, and recommending such guidelines for the Commission's adoption in an appropriate procedural forum.

11. COMMISSION REPORT

The Commission shall provide an annual report to the Legislature beginning in January, 1989, on the progress of activities undertaken by each utility to implement Public Utilities Code Sections 8281 through 8286 and this general order, as required by Section 8283(e).

11.1. In this report, the Commission shall recommend a program for carrying out the policy declared in the above-mentioned sections of the Public Utilities Code, together with recommendations for legislation it deems necessary or desirable to further that policy.

11.2. This report shall include recommendations to the utilities for the achievement of maximum results in implementing legislative policy and this general order.

Approved and dated June 3, 1992, to become effective June 3, 1992, at San Francisco, California.

PUBLIC UTILITIES
COMMISSION
STATE OF CALIFORNIA

By: Neal J. Shulman
Executive Director

DEFENDANT'S EXHIBIT B

LETTERHEAD OF PACIFIC BELL

February 1, 1991

Mr. Jack Bras
J. Jack Bras & Associates
90 Mission Drive
Pleasanton, CA 94566

Dear Mr. Bras,

We are requesting a some preliminary business information from firms that have recently provided architectural services to our Real Estate Management organization in the Bay Area.

One of our efforts to improve the overall quality or real estate services within Pacific Bell includes the development of improved business partnerships with the firms that we continue to do business with. We believe that those improvements are more likely to be accomplished with a limited number of affiliations and have begun to explore methods to reach that end.

At some future time, we plan to request comprehensive proposals from selected architectural firms based on the information we receive in response to the attached form. Those future proposals will serve as the basis for our final selection of architectural firms.

As a member of Pacific Bell's Supplier Management organization I will be representing the Real Estate Management group in the capacity of Contract Manager for architectural services in the Bay Area. Please feel free to call me on 415-823-0805 with any questions.

It is imperative that we receive this information by February 15, 1991, otherwise your firm will be disqualified from participating in our corporate long-term plans.

/s/ Paula S. Knapp
Paula S. Knapp
Contract Manager

Attachment

DEFENDANT'S EXHIBIT C

LETTERHEAD OF J. JACK BRAS AND ASSOCIATES ARCHITECTS

February 4, 1991

Paula S. Knapp
Pacific Bell
2600 Camino Ramon, Room 3 E 200
San Ramon, CA 94583

SUBJECT: PRE-QUALIFICATION CRITERIA

Dear Ms Knapp:

It is our pleasure to submit the enclosed Pre-Qualification Criteria form to you as requested.

We have provided professional architectural services to Pacific Bell since 1969, during which time we have successfully completed numerous projects ranging from equipment buildings to offices.

Our projects for Pacific Bell have always been done in a professional manner, completed on time, and within budget.

We hope that our past record speaks for itself, and we sincerely hope that you will continue to consider us as Architectural Consultants. We look forward to a continuing professional relationship with Pacific Bell.

Sincerely,

/s/ J. Jack Bras

J. Jack Bras

JJB:tt
Enc: Pre-Qualification Criteria form
Income Statement and Balance Sheet

LETTERHEAD OF J. JACK BRAS AND ASSOCIATED ARCHITECTS

PACIFIC BELL

REAL ESTATE MANAGEMENT — BAY AREA ARCHITECTS

PRE-QUALIFICATION CRITERIA

1. Please provide the number of licensed architects in firm?

   We currently have two licensed architects on staff.

2. How long has your firm been in business under the present name? If less than one year, explain the change in your corporate structure.

   I established the firm in 1964 under the present name.

3. Please provide a copy of your current Income Statement and Balance Sheet.

   See attachments.

4. Our records indicate $119,000 paid to your firm in 1990, please verify and correct this figure.

   Our figures show $122,807.03.

5. Has your firm provided design services for new construction or renovation of telephone company central office projects?

   Yes, several over the years since 1969.

6. Has your firm provided design services for new construction or renovation of telephone company administrative space projects?

   Yes, several over the years since 1969.

PACIFIC BELL
REAL ESTATE MANAGEMENT — BAY AREA ARCHITECTS
PRE-QUALIFICATION CRITERIA
(continued)

7. What is your CAD capabilities now?

   We are in the process of converting some details to Auto-CAD.

8. Are you willing to participate in future technologies to meet our requirements, such as Electronic Data Interface for billing?

   Yes, depending on specific review of the requests.

9. Is your firm capable of providing design services in the bay area counties of: San Francisco, Contra Costa, Alameda, and Santa Clara?

   Yes, we have done work over the years in Contra Costa, Alameda, and Santa Clara Counties.

10. Are you currently certified through the Cordoba Corporation Clearing House process for Minority/Women Business Enterprise status.

    No.

11. Are you willing to share your internal cost structures and work flow processes with us in an effort to jointly improve the quality process within both our firms.

    Yes.

/s/ J. Jack Bras 2/5/91

J. Jack Bras date

J. JACK BRAS & ASSOCIATES
ARCHITECTS

9-9-91
J. Jack Bras and Associates Architects
Jack Bras

Counties:
San Francisco
San Mateo
Alameda
Contra Costa
Santa Clara

SELECTED WEIGHTING CRITERIA OF 13 FIRMS

ATTRIBUTES:

QUALITY OF PAST PERFORMANCE
7th Ranking

Due to the unique requirements of Pacific Bell (Pacific), projects and special responsibilities assigned to our design firms, the quality of past performance is best judged by those field managers and engineers that are most familiar with their actual performance. Ranking was based on the experience of field managers in specific areas for performance, interaction, and process.

CENTRAL OFFICE DESIGN EXPERIENCE
2nd Ranking (2 firms tied)

The specialized nature and service affecting potential of central office projects is critical to Pacific Bell. Ranking was based on firms that have satisfactorily designed new central offices or renovations of existing central offices.

ADMINISTRATIVE SPACE DESIGN EXPERIENCE
3rd Ranking

Most architectural design firms have considerable experience in the design of administrative space. Ranking was based on experience in the design of unique telephone facilities for administrative space, operation quarters such as MC's, IC's, and other service center facilities.

MWBE STATUS
not applicable (non-minority)

Ranking was based on any firm that meets the official definition of a Minority or Women Owned Business (i.e., at least 51% ownership).

NUMBER OF LICENSED ARCHITECTS
3rd Ranking (5 firms tied)

Ranking was based on number of full-time architects.

NUMBER OF YEARS IN BUSINESS
1st Ranking (12 firms tied)

It is recognized that architectural firms undergo some changes in personnel and size, the experience level and continuity of the principle's involvement. Ranking was based on the number of years in business.

1990 EXPENDITURES
5th Ranking

Ranking was based on Pacific's utilization of the firm's services during 1990 and the existence of a current blanket contract.

CAD CAPABILITY
2nd Ranking (7 firms tied)

CAD capability is vital to efficient design procedures. Ranking was based on firms that are fully compatible with Pacific protocols (G.D.S. format) and AUTOCAD.

SIZE OF ORGANIZATION
4th Ranking (2 firms tied)

The size of a design firm can be critical to the firm's ability to provide, in a timely manner, all the design services required by Pacific. Ranking was based on the number of full-time employees including both principles and employees.

brief1

Exhibit 25

PACIFIC BELL LETTERHEAD

July 26, 1991

J. Jack Bras and Associates Architects
90 Mission Drive
Pleasanton, CA 94566

Dr. Mr. Bras,

This is in response to your letter of June 28 that has been referred to me by Mr. Quigley. We appreciate your interest and business relationship with Pacific Bell and would like to share our process with you.

Pacific Bell, in general, and our Real Estate Management department, specifically, are striving for improved quality in all areas of our business. This includes not only our internal processes but also the relationships with outside firms that supply products and services to us. We believe that these business relationships can best be developed by working closely with a small number of suppliers who become our "business partners" over a period of time.

Since a close relationship is very difficult to maintain when working with a large number of architectural firms, we, unfortunately, have had to sacrifice some past associations with very competent and professional firms such as yours. The process that we used to select architectural firms in the Bay Area included evaluation of current information that you submitted in your letter of February 4th. We also surveyed the past experiences of our project managers and field engineers with each firm.

I would like to assure you that your firm was very competitive and was not eliminated due to any unsatisfactory performance. If you would prefer a more detailed discussion of our selection process I would be happy to

arrange a meeting between yourself and our contracting managers.

Again, I appreciate your interest and the many contributions to our business. We plan to maintain your information on file and will be happy to consider Bras & Associates when our contract for architectural services is reevaluated in the future.

Sincerely,

/s/ Jack Behuresht

for M.J. Cochrane

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. Jack Bras & Associates,

Plaintiff,

vs.

PACIFIC BELL, a Corporation, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE Program Manager for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

No. C92 0304 VRW

CONTINUED DEPOSITION OF JACK BEHURESHT

VOLUME II

Taken before DOREEN L. COVARELLI,

a Certified Shorthand Reporter

State of California

CSR No. 8039

October 16, 1992

EMERICK AND FINCH
CERTIFIED SHORTHAND REPORTERS
18 CROW CANYON CT. #185 SAN RAMON, CA 94583

what you're asking, are you asking whether if he did the math basically on this matrix and subtracted the M/WBE points from those vendors who were given those points what would the rankings be? Is that what you're asking him on this matrix?

MR. GARVIN: That's another way of putting it.

THE WITNESS: From a purely math perspective, Intergraph would have had a score of 47.4 and Bras would have had a score of 48. A .6 difference.

MR. BERG: You mean — you mixed two answers. You said a .6 difference. I think your answer will read 48.6.

THE REPORTER: I got it.

MR. GARVIN: Q. I hate to go through this again, but there is some confusion.

A. Sure.

Q. Correct me if I'm wrong, I think what you're telling me is that if you eliminate M/WBE as a factor here and subtract 10 points from the scores of Intergraph, that Mr. Bras would mathematically rate higher at 48.0 versus Intergraph at 47.4.

Is that a fair statement.

MR. BERG: Mathematically?

MR. GARVIN: Yes.

THE WITNESS: Yes.

MR. GARVIN: Q. On that mathematical basis, then, one would conclude, would one not, that Mr. Bras would rank No. 3 as to the overall 13 architects set forth in this matrix?

MR. BERG: Before you answer that, could you read the question back to me, please?

(Record read.)

MR. BERG: It's argumentative as to form, but otherwise, you can answer.

THE WITNESS: Mathematically, yes.

MR. GARVIN: Q. Now, was there some determination made at some point that you would — "you" meaning Pacific Bell — would complete this process by selecting the top three architectural firms?

MR. BERG: It's vague as to time.

MR. GARVIN: I said at the completion of this process.

MR. BERG: I know, but if you read your question, you're going to see it's vague as to when the decision was made.

MR. GARVIN: Q. Whenever it was made, at the end of the process you made a decision, did you not?

A. At the end of the process, we made a decision.

Q. And in this case, the decision was to award contracts to the three top firms, architectural firms, "the three top," meaning the three who scored the highest in this study?

A. No.

Q. What was your decision?

A. The decision was to engage the top three for a negotiation.

Q. I see. And had M/WBE — strike that.

When you say "top three," you mean reduced the number from 13 to 3?

A. The — well, the top three firms, Garcia/Wagner, Intergraph and Roja, they were subject of further review and negotiation because potentially, we may not have reached an agreement to go any further.

Q. I understand this is kind of a preliminary screening?

A. Correct. It was just a guide for us to go through successive steps.

Q. Now, getting back to Mr. Bras, had the M/WBE status been eliminated as a factor, he would have been or survived that preliminary screening and been within one of the three firms.

Is that a correct conclusion?

A. No, that is not a correct conclusion.

Q. Where am I wrong?

A. The way we look at it is we put emphasis on expense of central office work and also administrative work and one of the objectives would have been for us to ensure that we had more than one firm that could deliver these type of services.

On this particular scenario that you described, had Mr. Bras been the third firm, we would have been in a very awkward position of not having an architectural — not having more than one architectural firm that was proficient on the administrative space design experience. And then there are other factors, as well.

Q. Let's take them one at a time, then.

Are you telling me that you would have some difficulty because Mr. Bras did not have the administrative design experience?

A. With Pacific?

Q. With Pacific. At least sufficient for your purposes?

A. Based on the ratings provided by the project field people.

Q. And I think you said that you'd only be left with one firm with that kind of experience had Bras been in that top three?

A. Correct.

Q. And what firm would that have been?

A. That was Garcia/Wagner.

Q. And with Intergraph, in fact, being within the top three, can you consider, "you" being Pacific Bell, that Intergraph had sufficient administrative design experience to satisfy your needs?

A. Based on the rating provided by the field people, yes.

Q. I take it by this rating in Exhibit 11, the matrix, Roja even had less administrative design experience that Mr. Bras?

MR. BERG: Excuse me. You misstated. I think you're talking about Exhibit 12.

MR. GARVIN: I'm sorry. Exhibit 12. Did I say 11?

MR. BERG: Yes.

MR. GARVIN: Change that to 12.

MR. BERG: Now, can I hear the question again? What was the question, unless you want to say it again.

MR. GARVIN: I can say it again.

Q. Referring to Exhibit 12, as to the attribute of administrative design experience, you would conclude that Mr. Roja or the Roja firm even had less administrative design experience of Mr. Bras.

Is that a correct conclusion?

A. Based on the ratings, he received a 1 and Bras received 4.

Q. So was this data set forth in Exhibit 12 the only data on which you, Pacific Bell, relied on in making the preliminary cut, so to speak?

MR. BERG: Vague and ambiguous as to the word "preliminary cut."

MR. GAVIN: Q. I mean a cut from 13 to 3, which I was told was a preliminary matter.

A. Based on the analysis of the data, yes.

Q. Data set forth in 12, Exhibit 12?

A. Yes.

Q. Now, you'll notice referring to Exhibit 12.

present concerns about Bras' organization as to how may people it had. It was a hypothetical question and that was the context.

MR. GARVIN: Well —

THE WITNESS: I was mentioning to you some additional factors that went into analysis of the data, if you will, that, for example, mathematically it is possible that second through fourth and fifth would have all had bottom-line scores that were identical.

MR. GARVIN: Q. Mathematically possible?

A. That is possible. And that obviously would require us to do some additional analysis. So you can see where there is other factors that would have been considered.

Q. Let's shift from the hypothetical to what was. When you got to the three top scorers, Roja, Intergraph and Garcia, mathematically they all met that threshold?

MR. BERG: What threshold? That assumes facts. There is no minimum or maximum points that he's testified to.

MR. GARVIN: Q. I'm stuck with this number three. Did you make some determination, "you" meaning Pacific Bell, that you wanted to reduce the number to three firms?

A. Yes, we did.

Q. So mathematically on this matrix, you picked the top three firms mathematically speaking?

A. We did not pick the top three exclusively based on the mathematics. In other words, I look at the top three to ensure that the top three would provide the balance capabilities that we needed.

Q. And did you make that determination?

A. Yes, I did.

Q. So as it so happens in this case, mathematically the top three firms mathematically just happened to look good to you on balance after looking over the whole process?

MR. BERG: Objection. Argumentative as to form.

MR. GARVIN: Q. Is that true?

A. When I looked at the results, the top three firms appear to have a well balance of the capabilities we were looking for so that basically allowed us to then go to the next step of beginning the dialogue on association with them.

Q. When you talk about the — what did you call it, the qualities you were looking for —

A. The capabilities.

Q. — the capabilities you were looking for?

A. Right.

Q. Can you spell out these capabilities? In other words, are they spelled out here in the matrix or were there some other capabilities you were looking for other than what was considered in these attributes?

A. Primarily they are the attributes that are stated in the matrix, however, primarily that's what it is.

Q. Then you went on into negotiating or you had — why don't you tell me what happened after that.

A. Well, this was a guide for this stage of the process. This would eventually identify certain ranking. We would analyze it, then we would decide who are the three firms, engage in further dialogue and provide us with additional data. They would have to review our contracts because we also change our contracts and so there was quite a bit of involvement that would take place subsequent to this and if, let's say, one of the firms would not prevail, we would have then gone back to the list, taken the next one and successive

negotiation and eventually we could have arrived at a list of three.

Q. When you say you would take the next one, you mean the next one that scored highest mathematically?

A. The next one in a balanced way would compliment the ones that we had.

Q. I thought I saw a document of that process that occurred afterwards.

A. Sure. I —

Q. I guess what I'm looking for was there a letter that went to Garcia, Roja and Intergraph after this preliminary process ended, a letter inviting them

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Attorney for Plaintiff
J. JACK BRAS, individually
and doing business as
J. JACK BRAS & ASSOCIATES

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

J. JACK BRAS, individually and doing business as J. JACK BRAS & ASSOCIATES,

Plaintiff.

v.

PACIFIC BELL, A CORPORATION, CALIFORNIA PUBLIC UTILITIES COMMISSION, PHILIP BREMOND in his representative capacity as MWDVBE PROGRAM MANAGER for the California Public Utilities Commission, NEAL SHULMAN in his representative capacity as Executive Director of the California Public Utilities Commission,

Defendants.

Civil No. C 92 0304 VRW

DECLARATION OF J. JACK BRAS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, JACK BRAS, hereby declare that:

1. I am a white male;

2. At all times material herein I have been and continue to be a licensed architect in the State of California and engaged in the private practice of architecture under the name of J. Jack Bras & Associates with offices at 90 Mission Drive, #6, Pleasanton, CA 94566;

3. At all times herein material I have had in my employ another licensed architect named Hugh Anton;

4. Commencing sometime in 1969 until early 1991 I have continuously provided architectural services to Pacific Bell on a project by project basis upon the issuance of a work order governed by a succession of three year contracts, the last one being issued June 30, 1989. This contract only applies if and when Pacific Bell chooses to award me a work order;

5. For the period 1983 through 1990 revenue generated by the Pacific Bell account for architectural services performed by my firm approximated 30% of gross receipts.

6. Sometime in early February, 1991, I received a letter from Paula S. Knapp, contractor manager for Pacific Bell. (Exhibit "5".) As noted this letter solicited current information for evaluation purposes to determine whether I, as well as other architects provided services to Pacific Bell, could continue in that relationship. I responded by letter of February 4, 1991 (Exhibit "6") including in that transmittal my response to Pacific Bell's "Pre-Qualification Criteria." (Exhibit "6".) As will be noted, Question No. 10 inquired, in substance, as to whether I was certified as a minority/women business enterprise as to which I responded "no," that being the truth of the matter;

7. From and after my response to Paula Knapp's letter of February 4, 1991 I did not receive any further architectural business from Pacific Bell except later, after I threatened a lawsuit following lengthy exchanges of correspondence as well as a meeting and then only to the extent of a few small projects;

8. The next indication I received that Pacific Bell was utilizing WMBE status as a factor in determining with whom they would do architectural business in the future came in a telephone call from Paula Knapp to my associate, Hugh Anton, on April 16, 1991 seeking to affirm that my architectural firm did not have WMBE status. See the Declaration of Hugh Anton in that respect;

9. Receiving no further new assignments from Pacific Bell I then wrote to Phil Quigley, President and CEO of Pacific Bell by letter of June 28, 1991. (Exhibit "7".) In that letter I complained about the unexplained loss of business. In response to my letter I received a letter from Mr. Jack Behuresht, Pacific Bell's Director of Project Management-Real Estate explaining Pacific Bell's desire to reduce the number of suppliers who would become "business partners" over a period of time — a relationship I had enjoyed with Pacific Bell for over twenty years. Mr. Behuresht further, in that letter, assured me that my firm was very competitive and that I was not eliminated due to any unsatisfactory performance. (Exhibit "8.")

I responded to Mr. Behuresht's letter by my letter of August 19, 1991 (Exhibit "9") questioning whether the "selection process" was fundamentally grounded upon racial considerations. Thereafter, a meeting was held at Pacific Bell's offices on September 10, 1991 attended by myself, my associate Hugh Anton, Jack Behuresht, Paula Knapp and John Couch. Once again I received no definitive answer as

to why I had been eliminated but was given a document entitled "Selected Weighting Criteria of 13 Firms" (Exhibit "11") setting forth my ranking as to various criteria or factors in comparison with twelve other firms. The factor relating to MWBE status was, on that document, labeled as "not applicable" which turned out to be an untrue statement.

10. On September 24, 1991 I sent a letter back to Mr. Behuresht (Exhibit "10") which, among other things, questioned whether WMBE status was indeed a factor in the selection process. In response to this, I received a letter from Mr. Behuresht dated October 16, 1991 (Exhibit "12") which, among other things, admitted that while each firm was not ranked with respect to its WMBE status, it was one of the criteria used in the selection process;

11. The person who owns the architectural firm called Intergraph is a person named George Grover who I know to be an Asian Pacific American. Mr. Grover's firm, Intergraph, is thus an MBE firm, his firm being one of the three selected to provide architectural services to Pacific Bell instead of my firm, a non-MBE firm;

12. I earnestly desire my long term business relationship with Pacific Bell in the performance of architectural services to it in the future and stand ready, willing and able to provide such services should I be given an opportunity to do so;

13. I did settle my claim for money damages against Pacific Bell under an agreement whereby 50% of the monetary consideration represented recovery for economic damages and the other 50% representing recovery for non-economic damages. I further represent that the amount recovered for economic damages provided some measure of recovery as to past loss of revenues with little, if any,

consideration being paid for loss of future revenues caused by this wrong which has been perpetrated against me.

I hereby declare that I have personal knowledge of each and every fact as stated herein and am competent to testify thereto if called as a witness at trial. I declare under penalty of perjury that the foregoing is true and correct and that this declaration is ecuted at Pleasanton, California on January 21, 1993.

/s/ J. JACK BRAS

J. JACK BRAS

Decision 90-10-032 October 12, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

MUSE CORDERO CHEN, INC.,
Complainant,

vs.

PACIFIC BELL (U 1001 C),
Defendant.

Case 89-06-058
(Filed June 28, 1989)

J. Melvin Muse, for Muse Cordero Chen Inc., complainant.
Mary Vanderpan, Attorney at Law, for Pacific Bell, defendant.

OPINION

Muse Cordero Chen, Inc. (Muse), an advertising agency, seeks an order that Pacific Bell (Pacific) cease and desist from conducting its minority business enterprises program in a discriminatory manner. Pacific denies discrimination. Public hearing was held before Administrative Law Judge Robert Barnett.

The basic facts leading to the alleged discrimination are not disputed. In April 1988 Pacific issued a press release in which it announced that it sought "an Asian-owned and operated advertising agency to develop advertising and brochures in Chinese, Vietnamese and Korean." Muse, which had done advertising business with Pacific, responded. A Pacific employee, Ms. Joyce Sand, telephoned Mr. David Chew, a partner of Muse, to discuss Muse's qualifications. Ms. Sand asked about the minority makeup of the Muse agency. Mr. Chew said his company was not 51% Asian-owned and operated, but was owned by a black, a Hispanic, and an Asian. The percentage ownership is 70% black, 15% Hispanic, and 15% Asian. Ms. Sand said that

because Pacific's ad campaign was targeted at the Asian community Pacific required an advertising agency that was at least 51% Asian owned and operated; since Muse did not meet that criterion, she said it was disqualified from participating in the selection process. Seventy-four agencies had responded to Pacific's press release and eventually two were selected, both of which were at least 51% owned and operated by Asians.

Muse contends that because it is minority owned and operated, it should not have been disqualified from competing for the advertising business. It asserts that Pacific's requirement that its ad agency be of the same ethnic group as the target community is discriminatory.

Muse witness Chen testified that Muse had produced Asian targeted ads for Pacific Bell designed to increase ethnic awareness of the Universal Lifeline Telephone System which resulted in an increase in awareness 156% higher than PacBell's expectations, and that when Muse didn't get the disputed PacBell account, a lot of people wrote letters on its behalf. (Tr. 124-125.)

Pacific presented four witnesses who testified in support of Pacific's policy of using ad agencies of the same ethnic background as that of the target group. Ms. Beatrice Molina, a former past president of the Mexican American Political Association and the owner and operator of a 100% Hispanic advertising agency, testified that Pacific's policy was reasonable and furthered the aims of the various minority communities. She testified that she was, and is, an active member of numerous civil rights groups. Those groups have had problems with past advertising campaigns of large organizations like Pacific. Products developed by non-ethnic enterprises for a particular minority market, in her case, the Hispanic, were often of poor quality, were insensitive to the culture, and reflected a poor public image for the advertiser. Of equal importance she said was the need for the ethnic

community to benefit financially from the relationship with the advertiser. It is not enough that a major White-owned firm hires a minority employee to do the actual ad work; the profit from the job and the prestige of representing a large advertiser should stay in the minority community. In her opinion, the target minority agency brings ethnic and cultural sensitivities that a non-ethnic agency can never attain. She asserted that the minority organizations of which she is a member support the principle that when an Asian community is targeted by an advertising campaign, an Asian ad agency should get the job; when a Black community is targeted, a Black agency should get the job; and when the Hispanic community is targeted, an Hispanic agency should get the job.

Molina conceded that the Asian community consists of a number of subcommunities such as Koreans, Chinese, Japanese, Taiwainese and so on, and that there are extensive cultural differences between such subcommunities. She testified that Asian targeted advertising is far more complicated than advertising to Hispanic communities:

> "The Hispanic community, at least there's a commonality of language. In the Asian communities there's not that much commonality, and there certainly isn't in language, there certainly isn't in use of verbiage, use of address, use of culture, use of color. They're extremely different.
>
> "And some of the no-nos that have been done is they tried to use one Asian visual effect to encompass all Asian cultures, and you can't possibly do that without offending somebody." (Tr. 56-57.)

The Executive Director of Self-Help for the Elderly, a nonprofit service organization, testified by affidavit that the expertise of an Asian advertising agency is the best way in which the cultural awareness of the Asian communities can

be incorporated in ads targeted to the Asian community. The Asian-owned and operated agency will be aware of the cultural appropriateness of even simple things such as what color to wear and what words to use. The Asian-owned agency will know of the Asian owned newspapers and television stations. And especially, the Asian-owned agency will know of the subtle differences between the numerous Asian cultures—Chinese, Japanese, Korean, Vietnamese, etc.

Pacific's Executive Director of Marketing Communications testified that it was Pacific's policy to use an ad agency of the ethnic makeup of the target customer group. Pacific's concerns were the same as the previous witnesses': The agency should be expert in the culture of the target community, be best able to communicate with the target community, and be able to retain in the target community the intangible benefits of representing a large company. He said that he had three ad campaigns targeted to minority communities—the Black community, the Hispanic community, and the Asian community. In each case the ad agency that was awarded the contract was at least 51% owned and operated by persons of the target minority group. In his opinion, Pacific receives a better work product by having a 51% owned and operated target group requirement. He testified that the sole reason for eliminating Muse for consideration for the Asian ad work was the fact that Muse was not 51% or more owned and operated by Asians. However, all minority ad agencies are considered for all advertising contracts, except those targeted to specific minority groups.

When asked "suppose there is a second-, third-, or fourth-generation Japanese-American advertising professional, owns an advertising agency, but he has no knowledge at all of Asian languages. And he will be qualified because he owns 51 percent to that agency, in your review of Asian

advertising agencies?", the marketing director responded: "He might be initially qualified." (tr. 98-99)

The Director of Women and Minority Business Enterprise (WMBE) Programs for Pacific testified that she supported Pacific's policy for the same reasons given by the other witnesses. She said that since 1984 total dollars spent with WMBE firms increased from 3% of purchasing to 11% in 1989, or from $94 million annually to $200 million. Pacific has used a target community criterion for selecting a vendor in only three instances to date, the three ad campaigns targeting the Black, Asian, and Hispanic communities. In terms of total dollars, the three campaigns are a very small part of Pacific's minority business expenditures.

Discussion

In 1986 the Commission was directed by the legislature to establish guidelines for electric, gas, and telephone utilities with gross annual revenues exceeding $25,000,000 to be utilized by the utilities in establishing plans to increase women and minority business enterprise procurement in all categories. A minority business is defined as one at least 51% owned and operated by Black Americans, Hispanic Americans, Native Americans, or Asian Pacific Americans. (Public Utilities (PU) Code §§ 8281-8285.) Pursuant to that directive, the Commission promulgated General Order (GO) 156 "Rules Governing the Development of Programs to Increase Participation of Female and Minority Business Enterprises" (Adopted April 27, 1988, effective May 30, 1988, D.88-04-057 in R.87-02-026; modified by D.88-09-024.) The general order adopted the statutory definitions of women and minority owned and operated businesses and provided details of how the individual utilities should set up their plans, establish a clearinghouse to identify and verify women and minority businesses, establish goals, and report

annually to the Commission. The businesses affected by the general order are referred to as WMBEs.

The question presented in this complaint is whether a utility which targets a particular minority group as the recipient of an advertising campaign may limit its search for a WMBE advertising agency to an agency that is at least 51% owned and operated by members of the target group. We hold that it may not.

Complainant asserts, and defendant does not dispute, that complainant was not considered for the advertising contract solely because it was a Black owned and operated WMBE. Defendant asserts that the advertising contract was awarded to a qualified WMBE, an Asian American enterprise, and that complainant was not considered for the contract for a substantial business reason: the WMBE from that target community brings ethnic and cultural sensitivities that an outsider cannot attain, and revenue from the contract stays in the target community.

Muse claims discrimination and cites *City of Richmond v. Croson Co.* (1989) 488 US __, 102 L Ed 2d 854 in support of its position that a race-conscious classification is suspect, and that Pacific, when awarding a contract to a WMBE, should look no further than determining if the applicant is a WMBE.

In *Croson*, the City of Richmond adopted an ordinance which required non-minority-owned prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of the contract to Minority Business Enterprises (MBE). A White owned company was the only bidder on a city contract but did not have any MBE participants. The city refused to honor the bid and decided to rebid the project. The contractor sued to have the ordinance declared unconstitutional under the equal protection clause of the Fourteenth Amendment. The Supreme

Court held the ordinance to be invalid under the equal protection clause. It said that classifications based on race are suspect and subject to strict scrutiny, but may be valid as a remedy for past discrimination.

Croson considered the constitutionality of a city ordinance which established a 30% set aside for minorities. Muse attacks neither the enabling statute (Public Utilities Code §§ 8281-8285) nor our general order (GO 156) and so their validity is not before us; therefore, Croson is not directly applicable.

The question before us is not whether the statute and general order are valid, but rather whether it is permissible for Pacific to use race or ethnicity as the sole criteria to determine who may be considered for advertising contracts aimed at specific ethnic groups.

After a careful review of the record, we conclude that Pacific's decision, however well intentioned, to exclude Muse from consideration for Asian targeted advertising contracts solely on the basis of the race of Muse's owners was impermissible.

We have no problem with Pacific's desire to make sure that ethnic community targeted advertising is effective, and with the proposition that if advertising is to be effective it must consider the language and customs of the target group. We recognize that membership in the targeted group may well give an advertiser a natural advantage in this area.

We do, however, have a problem with the assumption that the only way to find the best advertiser for such a targeted campaign is to exclude from consideration all those who are not members of the targeted group.

Here, Muse witnesses testified that Muse had successfully engaged in Asian targeted ad campaigns for Pacific in the past, and had achieved results far exceeding the utility's goals. Muse was clearly qualified to create Asian targeted

ads even though Muse is not owned by Asians. Since Muse was at the outset eliminated from consideration solely because it was not 51% Asian owned, as defined in GO 156, it is impossible to determine whether Muse was more or less qualified than the advertising agencies ultimately awarded the contract in question.

Pacific's witnesses not only conceded that the Asian community was highly diverse, making it unlikely that a representative of one Asian subcommunity would have any special expertise regarding the language or cultural heritage of another Asian subcommunity, they conceded that a fourth-generation Japanese-American with no knowledge of any Asian language or culture would have been allowed to bid for the Asian targeted ad campaign contract. Muse, with its demonstrated expertise in the field, was not allowed to have its bid even considered.

Because the Commission does not award damages, there is little reason for us to delve into the procedural and substantive issues that might be addressed in discrimination litigation under various statutes and constitutional provisions. Neither party adequately addressed these issues, and we decline to make detailed findings regarding Pacific's compliance with these laws on the basis of the record in this proceeding.

Next, we will review Muse's allegation that Pacific's actions violated GO 156. We believe it is also necessary to review those actions in light of the legislation it implements, PU Code §§ 8281-8285. We find there are conflicting ways to view Pacific's actions under this statute and our regulations.

PU Code § 8281(a) states in pertinent part that:

"The Legislature hereby finds and declares that the essence of the American economic system of private enterprise is free competition. Only through full and

> free competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of that competition is basic to the economic well-being of this state and that well-being cannot be realized unless the actual and potential capacity of women and minority business enterprises is encouraged and developed."

Section 8281 goes on to note that:

> "It is in the state's interest to expeditiously improve the economically disadvantaged position of women and minority business enterprises," (§ 8281(b)(1)(C),"

and that:

> "(F) That procurement also benefits the public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby expanding competition among the suppliers and promoting economic efficiency in the process."

Section 8281(b)(2) declares that:

> "It is the purpose of this article to do all of the following: . . ." (B) Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electric, gas, and telephone corporation contracts . . .."

Section 4.2.1.1 of GO 156 states that utilities are to [a]ctively seek out opportunities to identify WMBE contractors and to expand WMBE source pools . . .."

The logic calling for inclusion of WMBEs as a class within the list of suppliers from whom the utilities procure goods and services calls equally for the inclusion of all qualified WMBEs within the class of suppliers who are considered for a particular utility contract. In either situa-

tion, the pool of potential supplier competitors is expanded by a policy favoring inclusion rather than exclusion of potential suppliers. Pacific's exclusion of non-Asian bidders from consideration for its Asian targeted ad campaign clearly diminishes the opportunity for non-Asians to do business with utilities. For this reason, Pacific appears to have violated the spirit if not the letter of PU Code §§ 8281-8285 and GO 156.

There is, however, a countervailing policy consideration. As Pacific points out, a natural byproduct of its effort to develop business relationships with WMBEs is a commitment to make business opportunities available to a cross-section of qualified WMBEs. We agree with Pacific that this commitment is neither inconsistent with nor prohibited by GO 156.

Having concluded that Pacific's decision to consider only bids by Asian businesses for its Asian targeted ad campaign and was not an appropriate method for ensuring the selection of the best firm for the job, we will order Pacific not to use race, national origin, or ethnicity as the sole basis for determining whose bids will be considered for contracts for the procurement of goods and services.

Further, PU Code § 453(b) states that "No public utility shall prejudice, disadvantage, or require different rates or deposit amounts from a person because of race . . . [or] national origin . . ." We believe that Pacific's conduct in this case violated Section 453(b) and we shall so find.

Once again, we emphasize that while a utility may not arbitrarily exclude a class of persons on grounds unrelated to their qualifications, the utility retains its authority to use its legitimate business judgment to select the best person for the work at hand. Advertisers from the targeted community may have a natural advantage regarding cultural sensitivity. But members of all racial, ethnic, and national origin classi-

fications must be allowed to compete; no one can be excluded because of an assumption that one class of persons is unable to understand another.

As we noted earlier, since Muse was at the outset eliminated from consideration for the contract because its owners were not Asian we have no basis for determining whether Muse was in fact more or less well qualified to do Asian targeted advertising than the firms actually awarded the contract. It is, therefore, impossible for us to determine whether or not Muse would have been awarded the contract had it not been for the race of its owners. For this reason, we cannot grant Muse's request that we order Pacific to do business with it.

From a review of Pacific's 1989 report on the WMBE program, we note that Pacific has made steady progress over the last three years in increasing its purchases from WMBE vendors. This improvement has been consistent with the letter and the spirit of the program, and we commend Pacific for it. Given this record of accomplishment we hope that the instant case reflects an aberration or misunderstanding on Pacific's part rather than a fundamental problem, and we would encourage Pacific to continue its level of commitment to pursue further improvement in the coming years.

Findings of Fact

1. In April 1988 Pacific sought an Asian owned and operated advertising agency to develop advertising and brochures in Chinese, Vietnamese, and Korean.

2. Muse, an ad agency whose ownership is 70% Black, 15% Hispanic, and 15% Asian, applied for the contract but was not considered because it was not at least 51% owned and operated by Asians.

3. Muse has in the past successfully produced Asian targeted advertisements for Pacific.

4. Because Muse was at the outset eliminated from consideration for the Asian targeted advertising contract solely because it was not 51% owned by Asians, it is impossible to determine whether Muse was more or less well qualified than the firms actually awarded the contract.

5. PU Code §§ 8281-8285 and GO 156 encourage expansion of the pool of vendors of goods and services to utilities.

6. Neither PU Code §§ 8281-8285 nor GO 156 requires utilities to diversify their sources of supply within the WMBE community as a whole, but neither prohibits a utility from doing so.

7. Pacific's decision to consider only bids from advertising agencies which were at least 51% Asian owned and operated for its contract to provide advertising and brochures for the target Asian community was not an appropriate means for selecting the best agency for the job.

Conclusions of Law

1. Since Pacific's exclusion of Muse from consideration for the Asian targeted advertising contract occurred before any consideration of Muse's merit as an advertiser, it is impossible to determine whether Muse was more or less qualified than the firms actually awarded contracts; without such information, the contract relief requested in the complaint should be denied.

2. Pacific should be ordered not to use race, ethnicity, or national origin as the sole basis for determining who will be considered for contracts to supply the utility with goods and services.

3. Pacific's exclusion of Muse from consideration for the Asian targeted advertising contract constituted a violation of PU Code § 453(b).

ORDER

IT IS ORDERED that:

1. The contract relief requested in the complaint is denied.

2. Pacific shall not use race, ethnicity, or national origin as the sole basis for determining who will be considered for contracts to supply the utility with goods and services.

This order is effective today.

Dated October 12, 1990, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I will file a written concurrence.

/s/ FREDERICK R. DUDA
Commissioner